THE AMERICAN DOCTRINE OF STATE SUCCESSION

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THE AMERICAN DOCTRINE OF STATE SUCCESSION

By

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PREFACE

The practice and policy of European nations relating to state succession has been examined and described, particularly by Max Huber and A. B. Keith. Upon the contributions of these publicists a doctrine of state succession for European states may be formulated. In the United States but little has been done in this field. It is the intent of this study to perform some of the "spade-work" necessary to accurate discussion and development of a general American doctrine of state succession, to correlate the findings into a description of general practice, and to offer a theory explaining the policy of the United States relating to the problems arising from changes of sovereignty in which it has been involved.

This work was originally suggested by Professor W. W. Willoughby and the late Professor John H. Latané. To Dr. Frederick S. Dunn and Dr. James Hart, especially, and Miss Mary P. Phillips and the staff of the Political Science Library, the author wishes to express his appreciation of their encouragement and assistance.

H. A. W.

CONTENTS

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CHAPTER I

Introduction

Readers of history know that some of its most colorful chapters deal with the rise and fall of nations. The imagination of the schoolboy takes fire with the tales of war and conquest and the struggles for existence waged by states ancient and modern. The suspense engendered by the inarticulate question, "What is to become of the struggling nation, its peoples, its property, and its laws" supplies a source of fascination for the story of the world. A study of state succession attempts to answer this question.

Since the beginnings of civilization the struggle for territory has been constant. The forces working for national territorial expansion always have been and for a long time to come will be present. In the comparatively short history of the United States alone, ten major state successions have been involved. America came into existence through one form of succession and it has expanded through others. At the moment of writing, the Congress of the United States is wrestling with the problems of another transfer of sovereignty, the independence of the Philippines.

In a world in which all the desirable habitable territory belongs to one nation or another and the expansion of one state means the waning of another, it is of prime importance that some device be found, accepted and applied to equitably solve the serious problems of personal and public rights and obligations that arise. These problems involve the disposition of thousands of dollars in public and private debts; they involve the traditions and emotions of the peoples whose nationality and citizenship may be affected. They deal with the promises of states. They range from the title of John

Doe to his land grant farm to the title of the United States to Texas.

The solution of such problems cannot be left to the caprice of a conquering nation or the bargaining of a rich one. It has been found necessary in private law to develop principles to govern the succession of property. How much more vital it is in international law to develop or discover principles to govern the disposition of peoples and their institutions!

The difficulties of such tasks are legion. This is readily recognized when it is realized that the factors determining the effects of a change of sovereignty are so numerous that they must be divided into four classes: causes; means; forms; and political organization.

The number of motives ascribed to the American Congress for its action in granting the independence of the Philippine Islands indicates that the causes of a succession may be legion. Inasmuch as the causes of a change of sovereignty may be political, psychological, geographic, and economic, the effects, often neither desired nor anticipated, may also fall into these categories. Much has been and is being written as to the causes, but comparatively little study has been given to the effects. In any such proposed study, it is well to note that, broadly speaking, the effects are, to some extent, determined by the causes. Unfortunately, some writers on state succession have had a tendency to disregard this platitude and have proceeded to discuss such effects *in vacuo*.

The means of bringing about a transfer of sovereignty also, in some measure, determine its effects. Perhaps in the future the fact that a territorial reorganization is brought about by armed force will not cause effects differing from those if such a reorganization is engineered by peaceful means. Unfortunately, this has not always been the case in the past. Conquered peoples have often been treated differently from the inhabitants of purchased territories. Nations have refused to pay the obligations incurred by annexed states when those obligations have been incurred to defray the expense of resisting such annexation. Indeed, some of the vague theories

of state succession have been definitely colored by the thought that the will of the conqueror will be imposed upon the conquered.

Not only causes and means but also the forms of state succession may be factors in determining the effects. When it is true that part or all of one or more states may be combined with or separated from one or more others, the variety of possible forms is large and the problems raised may vary.[1] In the case of the partition of Poland among a group of nations, the original state as an entity disappeared and problems arose as to the proper apportionment of its obligations among its successors. When Italy was unified, no such problem appeared. As may be seen later, a classification of these forms may be useful in explaining seeming inconsistencies in the practice of states when dealing with the problems arising from succession.

It is obvious that the political philosophy and method of government in succeeding states affects the political rights of the peoples living in the territory transferred. The position of the inhabitants in relation to the national government, when those inhabitants reside in a region annexed by a centralized state such as France, will differ from their position were the territory to be annexed by the federal state of Switzerland.

It is the task of international law, after taking into consideration all of these variable factors, to develop some method or device for equitably determining the legal effects of these changes of sovereignty. The utility of a principle (and by principle is meant a recognized and observed working device) which not only could be but would be applied in the settlement of problems of state succession involving millions of dollars in property, the rights of thousands of individuals, and the powers of states, is obvious. Regardless of whether

[1] Cf. Max Huber, Die Staatensuccession, p. 29. Huber has made a classification of the forms of state succession based on "Extension, the succession inducing element; Number of Successors, the principle of concurring on an equality in the effects proceeding; and Intension, the criterion of the grades of succession."

or not such a principle can be found, in view of the importance of the subject any search for a solution to the problems involved is not only justified but necessary.

In spite of the challenging problems raised as a result of state changes, but few writers have attempted to find and formulate rules governing their solution. Many general treatises on international law have referred to them only to pass quickly to other subjects. Unfortunately, most of the publicists who have explored the field have given an impression of vagueness in terms and confusion in discussion. Nevertheless, the development of three main theories of state succession can be found in the literature of the field.

The first of these, in point of development, was the theory of "universal succession," a doctrine taken from Roman Law and based on the analogy of a state to a private individual. It has had an influence that may be traced through the writings of many authorities from the time of Grotius to the present day.[2]

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[2] Although this theory was first introduced into international law by Grotius in De Iure Belli ac Pacis, Book 1, ch. iii, p. 8, it was implied in earlier works; see Cicero, On Duties, Book 2. Approaching the theory from different viewpoints, many writers have adopted, implied, or hinted at it, some with modifications:

Puffendorf, Droit des gens, Book 8, ch. xii, p. 610, Sec. 6.
Vattel, Droit des gens, Book 2, p. 178, Sec. 203; Book 3, Secs. 193-204; Book 1, Sec. 68.
Ullman, Völkerrecht, pp. 70 ff.
Kiatibian, Conséquences juridiques des transformations des états sur les traités, p. 61.
Gidel, Des Effets de l'annexion.
Calvo, Droit international, I, Secs. 99 ff., and I, ch. ii, p. 39.
Bluntschli, Droit international codifié, arts. 53-55.
Cosson, Cessions de territoire.
Despagnet, Droit international, Secs. 90 ff.
Esmein, Éléments de droit constitutionnel français et comparé, pp. 2, 3.
Hall, International Law, pp. 92, 99.
Hartmann, Institutionen des practischen Völkerrechts, Secs. 12 and 13.
Klüber, Völkerrecht, I, Sec. 165.
Larivière, Les Conséquences des transformations territoiriales des états sur les traités antérieurs.
Nys, Droit international, I, 399.
Piédelièvre, Droit international, Secs. 134-200.
Phillimore, International Law, III, 814.
Pradier-Fodéré, Traité de droit international, Secs. 151-163.

According to the Roman concept of succession, the "estate" with its rights and obligations was a legal personality possessed of immortality. Upon the death of an owner, his estate was preserved in its entirety with all its rights and obligations attached. Although this "universal succession" did not expressly state a liability on the part of the inheritor to more than the inheritance, it nevertheless pointed to it as a possibility. Not only did the legal relationship pass from one subject to another, but the subject of that relationship remained the same. In other words there was no succession, but a continuation.[3] When this theory was applied to international law, it led to the doctrine that a state had a "personality," composed by a unity of territory, population, political organization, rights, and liabilities, which passed *in toto* to its successor.

Very closely akin to this doctrine is a second, developed by Huber, which may be called the theory of "continuity."[4] Although it also conceives the legal rights and obligations of a state to be enduring in character and binding upon a successor state, it differs from the Roman concept because it declares that the personality of the original state is extin-

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Rivier, Principes du droit des gens, I, 69 ff.
Selosse, Traité de l'annexion au territoire français.
Wheaton, Elements of International Law, 39, 45, 46.
Woolsey, International Law, Sec. 38.

This doctrine has been followed in a distinctly modified form by:
Bonfils, Droit international, Secs. 100-101.
Dudley-Field, International Law, arts. 22-26.
Fauchille, Droit international, Secs. 214-233.
Hershey, "Succession of States," American Journal of International Law, V, 285 ff.

The patrimonial concept on which it was originally based has been denied or criticized by:
Appleton, Des Effets des annexions . . . sur les dettes de l'état. . . , ch. iv, pp. 107-108.
Chrétien, "Revue de la jurisprudence italienne," p. 743.
Vattel, Droit des gens, Book I, Sec. 68.

[3] For the Roman law concept of succession see Sohm's Institutes, pp. 501-504.

[4] Huber describes this theory by the title Universal Succession. We have used the term Continuity here so that the theory will not be confused with the Roman theory of universal succession, or confused with the term universal succession meaning complete change.

guished by a state change.[5] According to this theory, a new "personality" assumes the rights and obligations of the old *as if* they were its own. Huber wrote:

> The civil successor who steps into the place of his predecessor enters into the legal rights and obligations of the same as should the predecessor himself. . . . The successor in international law enters into the rights and obligations of his predecessor *as if* they were his own.[5]

A further difference arises from the fact that in Roman law the heir had no choice whether he would inherit or not, whereas Huber pointed out that in the case of states such an option exists.

In developing a third theory of succession Keith has gone a step further away from the old Roman idea. He has developed what may be denominated the doctrine of "discontinuity," [6] which provides that neither the "personality" nor the obligations of a ceding state are transferred to the annexing nation, but solely the rights enjoyed by the former sovereign.

> Succession is really merely a substitution without continuity. The rights obtain a new master and cease to be related to the obligations with which they were formerly allied, and there is no unity to enjoy a continuous existence.[7]

These three doctrines have been contributed by the litera-

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[5] Huber, entire, especially Secs. 18 to 23. Cocceijus, the commentary of Grotius, hinted at this doctrine when he wrote, "Negamus successionibus regnorum successoris personam pro eadem censeri cum persona defuncti," cited by Huber, p. 191, n. 42.

Heffter also hinted at an acceptance of this theory in Europäisches Völkerrecht, Sec. 25, p. 44. The theory was modified by Westlake so as to limit the liability of the successor in accordance with the rights and resources gained, Traité de droit international, pp. 71-86. Gabba, p. 386, arrived at a similar doctrine though he derived the continuity of rights and obligations from a continuity of the social, civil, and economic relations of a territory. Appleton modified this theory further, and introduced an analogy to the Roman *arrogatio*.

[6] Keith, in the Theory of the Sucession of States, describes this doctrine with the term "singular succession" because of its analogy to that doctrine in early Teutonic private law. The term "discontinuity" has been used in order to contrast it with Huber's theory and to remove it from the influences of confusing analogy.

[7] Keith, p. 5. Tendencies toward an acceptance of this theory have been shown throughout the early literature in scattered cases by various authors, especially by Holtzendorff, Handbuch des Völkerrechts, pp. 37-43, Sec. 10.

ture of international law as devices by which the problems of state succession may be solved. It is not proposed to enter into an analysis and criticism of them here. Assuming that these three theories are each the result of accurate thinking and valid reasoning, they must be judged, in the light of the purposes stated here, upon the basis of their acceptance in the custom of nations. It can readily be seen that the applications of these general theories will lead to different results. A state could make use of any one or all of them in different cases or at different times. Hence it is obvious that there is no secure basis in general theory upon which to speculate concerning the future action of a nation in a given case. An examination of the practice of individual states will determine the utility of these theories. Moreover, such an examination might reveal a different and yet consistent policy which states will likely pursue in future cases.

An investigation of the practice of many states when dealing with the various problems of state succession is too great a task to be undertaken here. Consequently, it is proposed to limit this study to discovering whether or not the United States has a consistent policy for dealing with state changes, and what that policy is. Any conclusions, system, or theory which may result will be based upon what has been done rather than what has been said. In other words, an effort will be made to discover first, what has been done and, secondly, an explanation which will fit the whole series of acts rather than explanations of outstanding single acts.

It is stated above that much of the literature relative to state succession is vague and unsatisfactory. Undoubtedly much of this confusion is attributable to the loose use of the term "state succession." [8] It has been employed to describe or imply all types of political changes whether they be governmental, constitutional, or state. Consequently, for the sake of clarity it is necessary to redefine the term in accordance with the purposes of the study.

[8] There are two writers who have said that there is no such thing as state succession: Gareis, Sec. 16; Liszt, Sec. 23.

State succession, as used herein, will mean a territorial reorganization accompanied by a change of sovereignty.[9] This will include only those cases wherein a new state power is extended over or set up in a territory in place of another state power or organization. Cases of "occupation" in the sense of discovery and claim, instances of "military occupation," transfers of protectorates, mandates and the like, and changes in the method of government are excluded by definition.

The exclusion of cases wherein a state occupies a territory which is not within the jurisdiction of an already organized and recognized state may be easily justified. When the United States gained its title to the Oregon territory on the basis of discovery, claim and occupation, it extended its sovereignty into a territory where no political or legal rights existed. In such politically unorganized territories, political and legal rights first come into being through the acts of an occupying sovereign. In such cases there is no question of transfer, but solely of the origin of rights and obligations.[10]

Instances of military occupation were not included because of the recognized transient and *de facto* character of such transfers of authority, in contrast to the permanent and *de jure* aspect which attends changes of sovereignty.[11] It is true that these occurrences often are followed by annexation, a phenomenon that falls within the scope of the definition, but they are not in themselves such annexations. The powers deriving from military occupation arise from the imminence

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[9] Cf. Huber's definition, p. 8, Sec. 6, which reads: "Rechtsnachfolge unter Staaten ist Nachfolge ins Staatsgebiet in der Weise, dass der Gebietsherr seine Staatsgewalt setszt an die Stelle oder über diejenige seines Vorgängers."

[10] Cf. Johnson and Graham's Lessee v. McIntosh, 8 Wheat, 543; Cariño v. Gov. of P. I., 212 U. S. 458-460; and Ad. Gen. of Bengal v. R. S. Dossee, Joseph Henry Beale, Cases on the Conflict of Laws, I, 67 and 68.

[11] Lord Stowell, in "the Manila," 1 Edw. 3, "Santo Domingo . . . cannot be considered . . . as being other than still a colony of the enemy." Also the same in "The Boletta," 1 Edw. 173, ". . . Possession taken by the French was of a forcible and temporary nature, and such a possession does not change the national character of the colony until it is confirmed by a formal cession, or by a long lapse of time." Also Fleming v. Page, 9 Howe 603.

of actual armed force. Although, because of the frequency of such abnormal occurrences, it has been found expedient for states to lay down some rules for the use of these powers, such rules do not have the status of the laws of a *de jure* sovereign.

Protectorates, mandates, administrative cessions, fiscal cessions, and the like may involve changes of sovereignty. The international status of them is as yet so confused and the juristic problems which they cause are so intricate that it is not deemed advisable to include them in a study of state succession.

Although it is comparatively easy to eliminate governmental changes from a definition of state succession, it is difficult to free any discussion of the subject from their intrusion. This is partially due to the confusion of state succession and constitutional change that has existed in the minds of many writers on international law from the time of Grotius to the present.[12]

It is possible to disperse this confusion only if the distinction between the state and its government be constantly borne in mind.[13]

> By the term state is understood the political person or entity which possesses the law-making right. By the term government is understood the agency through which the will of the state is formulated, expressed, and executed.

In governmental changes there are no shifts of boundaries, no transfers of sovereignty, although there are changes in internal organization or methods of exercising that sovereignty. In state succession the possession of the sovereign power is transferred from one state to another.

The effects of governmental transformations and state successions, though sometimes the same, are usually different. For instance, a change of the form of government used by a nation which is a party to a treaty will not extinguish that

[12] See discussion in Grotius, Book 2, ch. ix; and Vattel, Book 2, p. 178, Sec. 203. Also compare: Wheaton, p. 45; Pradier-Fodéré, Sec. 153; Fiore, International Law Codified, Sec. 136; Holtzendorff, Secs. 10-12; and A. N. Sack, Transformations des états, pp. 4-10.

[13] W. W. Willoughby, Fundamental Concepts of Public Law, ch. v, p. 49.

convention, whereas a transfer of sovereignty between nations is an oft used basis for terminating treaties with those nations. An illustration in point is the action of the United States in regard to the treaty of 1805 with Turkey and Tripoli. When Turkey assumed greater federal control over Tripoli, the United States held that its treaty with Tripoli was not terminated, but when Italy annexed Tripoli, the United States declared that the treaty was extinguished.

Although by definition important subjects deserving study have been eliminated from discussion, an examination of the five great fields of public laws and government, private laws, nationality, public and private debts, and treaties may lead to a general conclusion as to the policy and practice of the United States in relation to the problems of state succession.

CHAPTER II

Effect on Public Law and Government

The history of the expansion of the United States presents an interesting and comprehensive field for the study of state succession because of the differing social, legal, and political antecedents of the territories annexed, and because various forms of state succession have been involved. This history began when a group of the inhabitants of a British territory succeeded in establishing its independence and "separated" from the mother country. Louisiana and Florida were soon added through purchases and later the entire Republic of Texas was "absorbed." A conquest for which there was a monetary settlement as an afterthought extended American jurisdiction over a third of Mexico. The United States then expanded to territories which were not geographically contiguous: Alaska was purchased from Russia; the Republic of Hawaii was absorbed; Puerto Rico, the Philippines and other Spanish islands were annexed; and later purchases have added other islands as naval stations.

All but three of these transfers of territory were governed by treaties and the wording of those instruments leaves no doubts concerning the transfer of sovereignty.[1] The first exception was the original separation of the United States from England. Although Great Britain recognized the independence of the colonies by the Treaty of 1783, the courts of the United States held that this treaty had no validating or conveying function in respect to the title and sovereignty of the territory, because the succession had taken place before its negotiation and ratification.[2] The other exceptions were

[1] Treaty with Great Britain of 1785, Malloy's Treaties, I, 587.
Treaty with France of 1803, ibid., I, 509.
Treaty with Spain of 1819, ibid., II, 1652.
Treaty with Mexico of 1848, ibid., I, 1109.
Protocol of Queretaro, ibid., I, 1119.
Treaty with Mexico of 1853, ibid., I ,1121.
Treaty with Russia of 1867, ibid., II, 1521.
Treaty with Spain of 1898, ibid., II, 1691.

[2] M'Ilvaine v. Coxe's Lessee, 4 Cranch 209, 212.

the incorporation of Texas and of Hawaii [3] by their consent and a joint resolution of Congress.[4] A question might arise as to the time at which the sovereign jurisdiction over these acquired territories was passed to the United States, but it can hardly be doubted that a transfer of sovereignty took place.

The question of the time of the transfer of sovereignty arose following the American revolution. Although Great Britain ruled that sovereignty was not transferred until the Treaty of 1783, the American courts held that the sovereign power was vested in the United States with the signing of the Declaration of Independence.[5] Justice Cushing wrote:[6]

> This opinion is predicated upon a principle which is believed undeniable, that the several states which composed the Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states and that they did not derive them from the concessions made by the British King. The Treaty of peace contains a recognition of their independence, not a grant of it.

Usually, however, sovereign power over a territory is transferred at the time the treaty of cession goes into force,[7]

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[3] The Joint Resolution of Dec. 29, 1845, No. 1, 9 Stat. L., p. 108, for the admission of Texas resolved that, "The State of Texas shall be one, and is hereby declared to be one of the United States of America, and admitted to the Union on an equal footing with the original States in all respects whatever."

The Joint Resolution of July 7, 1898, No. 55, 30 Stat. L., p. 750, annexing Hawaii resolved, "That said cession is accepted, ratified, and confirmed, and that said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States, and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America."

[4] The United States also gained a lease over the Panama Canal Zone. Although it was not ceded permanently and in full sovereignty to the United States, "The Republic of Panama grants to the United States all the rights, powers, and authority within the zone mentioned . . . which the United States would possess and exercise *if it were* sovereign of the territory." Convention of Nov. 15, 1903.

[5] Inglis v. Trustees, 3 Peters 99; Harcourt v. Gaillard, 12 Wheaton 527, 523; McGregor v. Comstock, 16 Barb. 427; Case of Andrew Allen, Moore, International Arbitrations, I, 280.

[6] M'Ilvaine v. Coxe's Lessee, 4 Cranch 209, 212.

[7] The treaty of 1867, Arts. I and IV, Malloy's Treaties, II, 1521-1523, expressly stipulates to that effect. See especially the cases:

although the successor may not fully exercise that power until after the transfer and formal delivery of the ceded country. The legal validity of the acts of a ceding state ceases with the treaty of cession, but, for expediency, a number of powers covering local regulation, maintenance of peace and order, and administration of local affairs often are exercised by the ceding nation until the successor has substituted its own organization and officers. In such a case the ceding state exercises these powers during the period of replacement as an agent for the succeeding sovereign.[8]

The problem of determining the time of a transfer of sovereignty is often complicated by a military occupation in advance of the cession. Such was the case when Mexico ceded the Southwest to the United States.[9] To avoid confusion in such situations, it should be borne in mind that the military forces of a nation may act in two separate and distinct capacities. Before an occupied territory has been transferred to the occupying nation, the armed forces are prosecuting a war in enemy territory and their acts are governed by the laws of nations and military manuals regulating war and military occupation.[10] After the treaty of cession has been signed and ratified, the occupying forces lose the character of a hostile army in enemy territory and become an arm of the police, and as such an agent of the executive of the successor state. They are then governed by executive ordi-

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More v. Steinbach, 127 U. S. 70; Montault v. U. S., 12 How. 47; Alexander v. Roulet, 13 Wall. 423; De Lima v. Bidwell, 182 U. S. 1; Downes v. Bidwell, 182 U. S. 244; U. S. v. Reynes, 9 How. 127; U. S. v. Repentigny, 5 Wall. 211; Harcourt v. Gaillard, 12 Wheat. 527; Armstrong v. U. S., 182 U. S. 243; Fleming v. Page, 9 How. 603; Davis v. Concordia, 9 How. 280. Also see 22 Ops. Atty. Gen. 574, and 627; and Buchanan to de la Barca, July 27, 1847, MSS. Notes to Spain.

[8] Montault v. U. S., 12 How. 127, and cases cited. Also cf. Acts of July 7, 1898, and May 1, 1900. See Adee to Rooker, Feb. 24, 1899, 235 MSS. Dom. Let. 131.

[9] See the Report of Law Officer Magoon to the War Department for a complete discussion of the problem of the status of military occupation and its relation to our position in the possessions of Spain and Cuba.

[10] Magoon, pp. 1-19 and p. 467; Balban v. U. S., 40 Ct. Cl. 495, 207 U. S. 579; The Venice, 2 Wall. 258; 22 Ops. Atty. Gen. 560.

nances and by such laws as may be passed for the administration of the territory.[11] Military occupation merely suspends those laws and sovereign acts of an enemy nation not consistent with the exigencies of war, as the title and sovereign power over the region occupied can pass to the new sovereign only by treaty or other formal act.

In connection with this situation the question arises whether the will of the population ceded or the fact that a territory is gained by conquest affects the title of the annexing state or the status of the territory. The courts have held that they do not.[12] Although these conditions may influence the drafting of the subsequent treaties, it is the conventions themselves which determine both status and title.

The instrument of cession also usually determines the boundaries of the territory to which the change of sovereignty applies. However, when this was not the case, the general rule adopted by the United States has been that the transfer of jurisdiction applies to the entire territory as held by the preceding sovereign and as delimited by previous treaties.[13]

Regions which are thus passed from one sovereign to another are made up of two great proprietary domains: the public domain and the private domain. Control of the public domain is an integral part of the sovereign power, and is a direct result of the exercise of such power. Consequently, it must transfer to a successor with a change of sovereignty.

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[11] Armstrong v. Goyeo, 28 F. (2d) 900; Luckenbach S. S. Co. v. U. S., 279 U. S. 831; Mumford v. Wardwell, 6 Wall. 423; Montault v. U. S., 12 How. 47; 22 Ops. Atty. Gen. 560.

[12] Am. Ins. Co. v. Canter, 1 Pet. 511; Fleming v. Page, 9 How. 603; Johnson v. McIntosh, 8 Wheat. 543; Sanches v. U. S., 42 Ct. Cl. 458; The Fourteen Diamond Rings v. U. S., 183 U. S. 176; 22 Ops. Atty. Gen. 654; Hall, pp. 48-58; Sherman to Hoshi, Aug. 14, 1897, MSS. Notes to the Jap. Leg. I, 533-535; and Moore, Digest of International Law, I, 290.

[13] See treaties cited above, note 1. The Treaty of 1803, Malloy, I, 509, stipulates expressly to this effect. It was stated by Marcy as a general rule of International law in his note to Dallas, July 26, 1856, MSS. Instructions to the Embassy in Great Britain, XVII, 1, 11.

Also upholding this doctrine: Fairfield v. Coryell, Fed. Cas. No. 3230; Texas v. U. S., 143 U. S. 621, 633; Kenton v. Princess of Montalba, 1 Rob. 343; U. S. v. D'Auterive, 10 How. 609.

The courts have recognized this and there is no better established doctrine in state succession.[14]

What is included in the term "public domain" is a different and more difficult problem and is determined by the municipal law of the states involved. Usually, in treaties of cession, some specific list of public properties is incorporated which includes: public lots, public squares, adjacent islands, vacant lands, public buildings, fortifications, public archives,

[14] These cases and documents are listed in chronological grouping for convenience:

The American Revolution: Most of the public domain had been taken over by the United States before the Treaty of 1783. Treaty of 1783, Malloy, I, 587, by Art. I, passed all Great Britain's claims to proprietary and territorial rights to the U. S. Jay's Treaty of 1794, Art. II, ibid., I, 591, provided for the transfer of the Northwest posts to America.

Louisiana Purchase: Treaty of 1803, ibid., I, 509, Art. II, transferred the public domain and archives. This included all public and vacant lands and buildings which were not private property: New Orleans v. U. S., 10 Pet. 662; Strother v. Lucas, 12 Pet. 410; Am. Stat. Pap., For. Rel., II, 581, Dec. 1803.

Annexation of Texas: Joint Resolution No. 8, March 1, 5 Stat. L. 797, Sec. 2 provided for the transfer of the public domain to the United States. Act of Sept. 9, 1850, 9 Stat. L. 446, provided for compensating Texas for the transfer of its public property to the United States.

Mexican Cession: Treaty of 1848, Malloy, I, 1107, made no express stipulation for the transfer of the public domain, although it was implied from the extension of the boundary. Also see Alexander v. Roulet, 13 Wall. 433; More v. Steinbach, 127 U. S. 70; Friedman v. Goodman, Fed. Cas. No. 5119; Les Bois v. Bramell, 4 How. 449.

Florida Cession: The Treaty of 1819, Malloy, II, 1653, transferred the public domain by Art. II; Hardee v. Horton, 108 So. 189, 47 Sup. Ct. 107; Order for Delivery, For. Rel., IV, Oct. 24, 1820, pp. 749, 753; Adams to Nelson, Apr. 28, 1823, MSS. Inst. U. S. Min., IX, 183, 227. By Act of Transfer, For. Rel., IV, 749, the Spaniards excluded artillery, munitions and impediments; see Moore, Dig., I, 439-445.

Alaskan Purchase: The Treaty of 1867, Malloy, II, 1523, by Art. I, transferred the public domain, but excluded from it the Church property built and owned by the Russian Government. Also see: Kinkead v. U. S., 150 U. S. 483; U. S. v. Berryman, 2 Al. 442; U. S. v. British Schooners, 5 Al. 11.

Hawaiian Annexation: Joint Resolution No. 55, 30 Stat. L. 750; 22 Ops. Atty. Gen. 574 and 627.

Spanish Cessions: Treaty of 1898, Malloy, II, 1690, Art. VIII transferred the public domain; Art. V excepted small arms, livestock, ammunition, gun carriages, stand of colors, uncaptured war vessels, all calibres of guns with accessories, carriages, powder, materials, supplies, of forces of Spain. . . . Heavy ordnance in emplacements were to be left to the United States. See Moore,

harbors, magazines and the like. It has also been generally accepted that the public domain includes all proprietary titles not alienated to individuals. The importance of the definition of public domain is obvious when considered in the light of the statement made in Coffee versus Groover:[15]

> As a general principle of international law, a mere cession of territory only operates upon the sovereignty and jurisdiction, including the right to public domain, and not upon the private property of individuals which has been segregated from the public domain before the cession.

This right of public domain is no more an integral part of the exercise of sovereignty than the general legislative power of a state. By the same token, the power to regulate the peoples and the property of a territory through laws of its own making also transfers with a change of sovereignty. The exercise of the law-making power usually passes to that body in the successor state designated to perform this function, and when the United States succeeds to the rights and privileges of legislation over a particular territory, the exercise of these rights is lodged in Congress.[16]

Dig., I, for discussion of Spain's removal of all movable arms and the United States' reception of all immovable arms. The American Peace Commission in Paris, Oct. 3, 1898, held that all the public domain, real estate and public archives were to pass to the United States. Spain excepted the fixed property of the clerical, civil, and municipal corporations from this category, but relinquished its claim to any title therein. See 55th Cong., 3d sess., S. Doc. No. 62, pt. 2, pp. 22, 28, 34, 90. The same was true of the United States' title in the case of Puerto Rico and the Philippines. Griggs, 22 Ops. Atty. Gen. 544-547, was of the opinion the United States gained all property rights of Spain in Puerto Rico on the cession of Puerto Rico to the United States.

General Cases: U. S. v. Tract of Land, 28 Fed. Rep. No. 16, 535; U. S. v. Hackabee, 16 Wall. 414; U. S. v. Smith, 27 Fed. Cas. No. 16, 335; U. S. v. Prioleau, 2 H. & M. 559; U. S. v. MacRae, L. R. Eq. 8, p. 69; Hehn Co. v. Santa Cruz, 150 P. 62; Sanches v. U. S., 42 Ct. Cl. 458.

[15] Coffee v. Groover, 123 U. S. 1, 10.

[16] Ely's Administrators v. U. S., 171 U. S. 220, 231; In re Chavez, 149 Fed. Rep. 73; Harcourt v. Gaillard, 12 Wheat. 523; More v. Steinbach, 127 U. S. 70, 80; Alexander v. Roulet, 13 Wall. 386; Strother v. Lucas, 12 Pet. 410; Commonwealth v. Chapman, 13 Metc. 68; Kealoha v. Castle, 210 U. S. 149; U. S. v. Powers Heirs, 11 How. 570, 517; Ortiga v. Lara, 202 U. S. 339; Chicago and Pacific Rwy. v. McGlinn, 114 U. S. 452; Ams. Ins. Co. v. Canter, 1 Pet. 511, 542; Vilas v. Manila, 220 U. S. 345; Downes v. Bidwell, 182 U. S. 244; Campbell v. Hall, 1 Cowp. 204; Dooley v. U. S., 182 U. S. 222; Arm-

Is the exercise of this newly gained legislative power over a territory regulated by the public laws of the United States or the laws of the nation ceding the territory? This is not an idle question because the public policy and political institutions of states differ. One state may limit closely the exercise of the right to legislate whereas another may pursue a more liberal policy. The consistent legal and political practice [17] of the United States is stated in the ruling that: [18]

Every nation which acquires territory by treaty or conquest holds it according to its own constitution and laws.

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strong v. U. S., 182 U. S. 243; Inglis v. Trustees, 3 Pet. 99; Kie v. U. S., 27 Fed. Rep. 351; Blight's Lessee v. Rochester, 7 Wheat. 54; U. S. v. Reynes, 9 How. 127; Sanches v. U. S., 216 U. S. 167, 42 Ct. Cl. 458; U. S. v. Pico, 23 How. 321; M'Ilvaine v. Coxe's Lessee, 4 Cranch 209, 212; U. S. v. Yorba, 1 Wall. 412; Gonzales v. Williams, 192 U. S. 1; 2d Dooley v. U. S., 183 U. S. 151; Astiazaran v. The Santa Rita Land Co., 148 U. S. 80; Ainsa v. the New Mexico & Arizona Rwy., 175 U. S. 76, 79; Henderson v. Poindexter's Lessee, 12 Wheat. 530; U. S. v. Vaca, 18 How. 556; Pollard's Lessee v. Hagan, 3 How. 212, 225; U. S. v. Repentigny, 5 Wall. 211; De Lima v. Bidwell, 182 U. S. 1; Jones v. McMasters, 20 How. 8; Chouteau's Heirs v. U. S., 9 Pet. 145; Chouteau v. Eckhart, 2 How. 373; U. S. v. D'Auterive, 10 How. 609; Mumford v. Wardwell, 6 Wall. 423; Montault v. U. S., 12 How. 47; Barry v. Gamble, 3 How. 52; Luckenbach S. S. Co. v. U. S., 66 Ct. Cl. 679, 279 U. S. 831; Watts v. Ely Real Estate Investment Co., 254 F. 862; Philippine Sugar Estates Development Co. v. U. S., 39 Ct. Cl. 225; U. S. v. Vallejo, 1 Black. 541; Stearns v. U. S., 6 Wall. 589; Davis v. Concordia, 9 How. 288; McKennon v. Winn, 1 Okla. 327; O'Reilly de Camara v. Brooke, 209 U. S. 45, 142 Fed. Rep. 858; MacFarland v. the Alaska Pers. Mining Co., 3 Alaska 308; Am. R. R. Co. of Puerto Rico v. Didrickson, 227 U. S. 145; In re Lane, 135 U. S. 443; McGregor v. Comstock, 16 Barb. 427; Keene v. McDonough, 8 Pet. 308; People v. Fulsom, 5 Cal. 373; Robinson v. Minor, 10 How. 627; Wilson v. Wall, 6 Wall. 83; U. S. v. Hanson, 16 Pet. 196; Les Bois v. Bramell, 4 How. 204; U. S. v. Nelson, 29 F. 202; Kennedy v. State, 231 S. W. 683, 258 U. S. 617; U. S. v. Clarke, 46 F. 633; Chew v. Calvert, 1 Miss. 54; Mitchell v. U. S., 9 Pet. 711, 734; Fowler v. Smith, 2 Cal. 39; McMullen v. Hodge, 5 Tex. 34; Allen v. U. S., 47 F. 735; Soto v. U. S., 273 F. 628; Andrew Allen Case, Moore, Int. Arb. I, 290; Magoon, pp. 11, 19, 50, 54, 55, 464, 490. Ops. Atty. Gen., I, 108, 563; II ibid., 191; XXII ibid., 208, 384, 408, 526, 544, 546; XXIII ibid., 268, 414. 56th Cong., 2d sess., S. Doc. No. 140, p. 10.

[17] Justice Fuller, dissenting in Downes v. Bidwell, 182 U. S. 1, said: "The inhabitants of the annexed territory are impressed with the nationality of the acquiring power . . . the declaration that the civil rights and political status of the native inhabitants be determined by Congress merely embodies an accepted principle of international law."

Griggs, 22 Ops. Atty. Gen. 150, stated that when territory is acquired by treaty or conquest its relation to the conqueror depends

It should follow from this doctrine that if a ceding state permits the exercise of a particular power by one of its agents and its successor does not, the exercise of that special prerogative should cease with the transfer of sovereignty. This has been the practice. The courts of the United States have established that by an act of cession the special privileges held by monarchs by virtue of their royal prerogatives not only cease to be operative, but do not accrue to any branch of the American government.[19]

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on the laws of that nation unless controlled by the instrument of cession.

Pollard's Lessee v. Hagan, 3 How. 212, 225, held that acquired territory was to be held subject to the laws of the United States and not those of the ceding state. This was accepted in: U. S. v. D'Auterive, 10 How. 609; Montault v. U. S., 12 How. 47; U. S. v. Power's Heirs, 11 How. 570; Sanches v. U. S., 42 Ct. Cl. 458; U. S. v. Heirs of Rillieux, 14 How. 189; Hawaii v. Mankichi, 190 U. S. 197; and 56 Cong., 2d sess., S. Doc. No. 14, p. 9.

The Treaty of Paris of 1808, Malloy, I, 509, Art. IX, stipulated that the political rights and political status of the Puerto Ricans and Philippines were to be determined by Congress.

Magoon, p. 87, said, "In dealing with the inhabitants of newly acquired territory it is the spirit of the Constitution, the character of our institutions, and the laws of humanity and civilization that impose restraints in the absence of treaty stipulations in this respect." See also ibid., pp. 37-173.

In New Orleans v. U. S., 10 Pet. 662, it was held that, though the United States succeeded to the power which France and Spain respectively had had in Louisiana, it was still bound by its own constitution. Am. Ins. Co. v. Canter, 1 Pet. 511, the court felt that Florida was governed by virtue of the Constitution.

The doctrine took the form that the laws of the old state at variance with the public laws of the new ceased to apply in the territory ceded, in: More v. Steinbach, 127 U. S. 70, 81; Commonwealth v. Chapman, 13 Metc. 68; U. S. v. Vaca, 18 How. 556. See the much cited English cases: Blankard v. Galdy, 2 Salk. 411; Campbell v. Hall, 1 Cowp. 254. Also see For. Rel., 1896, VI, 117-135; ibid., 1897, I, 152, 154; and 22 Ops. Atty. Gen., 547-560.

It took a more ambiguous form also: "Acquired territory is to bear such relations to the acquirer as may be by him determined." See: Johnson v. McIntosh, 8 Wheat. 543, 595; Martin v. Waddell, 16 Pet. 367, 409; Jones v. U. S. 137 U. S. 202, 212; Shively v. Bowlby, 152 U. S. 1, 50; Cross v. Harrison, 16 How. 164; Downes v. Bidwell, 182 U. S. 244.

It was held in the Case of the Board of the Public Utility Commission v. Ynchanti, 251 U. S. 401, that some of the constitutional limitations upon Congress did not apply in unincorporated territories (Philippines). Also see discussion below for other cases on this subject.

[18] Fleming v. Page, 9 How. 603.

[19] In Pollard's Lessee v. Hagan, 3 How. 212, 225, it was held that

The laws regulating the use of special prerogatives and the employment of the legislative power are public political laws because they deal with the exercise of the sovereign power itself. Well established practice goes beyond these two particular expressions of public political law and states that all the public political laws of a ceding state cease with respect to the ceded territory with the change in sovereignty.[20]

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by the treaty of cession of Florida, the United States did not succeed to those rights which the King of Spain held by virtue of his royal prerogative. Magoon, p. 372, said that when Spain relinquished her sovereignty in Cuba she parted with all the royal prerogatives; that the laws governing their exercise by the Crown theretofore did not pass to the successors to the sovereignty, whether it be the United States as trustees, or the people of Cuba. See also, ibid., pp. 11, 19. Magoon also held that the powers delegated by the Royal Decree to governors of Puerto Rico in regard to the formation of corporations, or an exercise of these powers did not pass to the authorities of the United States. Ibid., p. 490.

[20] American Ins. Co. v. Canter, 1 Pet. 511, held, "The relations of the inhabitants of a ceded territory are dissolved and new relations are created between them and the Government which acquired their territory; the laws which may be denominated as political are necessarily changed by the transfer although the laws which regulate the intercourse and general conduct of the individuals remain in force until altered by the new Government."

Moore, Dig., I, 332-333, cites cases to the effect that laws political rather than municipal, local, private, in nature cease with the transfer of the territory. Also see in Magoon, pp. 11, 19, 86, 490; U. S. v. Vallejo, 1 Black. 541; Harcourt v. Gaillard, 12 Wheat. 523; and 22 Ops. Atty. Gen. pp. 566, 574-577, 627-631.

Downes v. Bidwell, 182 U. S. 244, held that the disappearance of the former sovereign abrogates those laws upholding it.

It has been held that the laws of the preceding sovereign at variance with the constitution, laws, and public policy of the new sovereign cease to exist on a change of sovereignty: More v. Steinbach, 127 U. S. 70, 81; Wagner v. Kenner, 2 Rob. 120; Hawaii v. Mankichi, 190 U. S. 197; U. S. v. Vaca, 18 How. 556; Campbell v. Hall, 1 Cowp. 204; Blankard v. Galdy, 2 Salk. 411; For. Rel. 1896, VI, 117-135; ibid., 1897, pp. 152-154; and cf. Act of Mar. 26, 1884, 2 Stat. L. 283, ch. 38, Sec. 11 and Sec. 13; Act of Mar. 3, 1805, 2 Stat. L. 331, ch. 31, Sec. 9; Act. of Mar. 3, 1821, 3 Stat. L. 637, ch. 39, Sec. 13; Act of Apr. 12, 1900, 31 Stat. L. 77, ch. 191; Act of Apr. 30, 1900, 31 Stat. L. 141, ch. 339, Sec. 6; Act of Mar. 3, 1917, 39 Stat. L. 1132, 171, Sec. 2, by which the local and election laws were specifically continued in the Virgin Isles.

People v. Fulsom, 5 Cal. 373, held that the laws regulating the immigration of aliens . . . were political in nature and therefore by annexation to the United States of territory formerly subject to an alien power these laws change with the transfer of sovereignty. Sanchez v. U. S., 42 Ct. Cl. 458, 216 U. S. 167, held laws keeping a person in public office are public in nature and change with the sovereign.

The term "public law," or "political law," is broad. It not only includes the laws regulating the relations of the state to its agents and the state in its relations to other states, but also the laws fixing and regulating the relation between citizen and sovereign.[21] It is quite distinct from "private law," or that class of laws which relate solely to the relations of the people to each other.[22] The only reliable conception of what the term "public law" includes must be gleaned from past application. Even then there is a constant danger of including in public law all those regulations which fall to the ground on a change of sovereignty, and of excluding those which are transferred. It may be that such is the only procedure by which the term may be defined adequately.

In spite of the scope of this term, the United States has held to the doctrine with remarkable consistency. The only departures have occurred when a strict application of the policy as to "public law" conflicted with other accepted principles which also were applicable because of the circumstances of the case. This occurs when the public laws of a ceding state have created obligations to individuals.[23]

O'Reilly de Camara v. Brooke, 142 F. 858, 209 U. S. 45, also held that laws concerning hereditary public office cease with change of sovereign.

The former sovereign's laws regarding the alienation of the public domain ceased with the change of sovereignty; Henderson v. Poindexter's Lessee, 12 Wheat. 530; U. S. v. Reynes, 9 How. 127; Alexander v. Roulet, 12 Wall. 423; Montault v. U. S., 12 How. 47; U. S. v. D'Auterive, 10 How. 280, 289; New Orleans v. U. S., 10 Pet. 662; Pollard's Lessee v. Hagan, 3 How. 212 225; U. S. v. Vallejo, 1 Black. 541; Davis v. Concordia, 9 How. 280, 289; Mumford v. Wardwell, 6 Wall. 423; Les Bois v. Bramell, 4 How. 449; Kennedy v. State, 231 S. W. 683, 258 U. S. 617; Jackson v. Porter, Fed. Cas. No. 7143; Stearns v. U. S., 6 Wall. 589; Keene v. McDonough, 8 Pet. 308; Robinson v. Minor, 10 How. 627; U. S. v. Hanson, 16 Pet. 196; U. S. v. Pico, 23 How. 321; also Wharton's Dig. of Int. Law, Sec. 5a; I Ops. Atty. Gen. 108; II ibid., 191; 22 ibid., 627; Magoon, p. 467; Buchanan to De la Barca, July 27, 1847; MSS. Notes to Spain. See cases cited in preceding note.

[21] Cf. Magoon, p. 86.

[22] 22 Ops. Atty. Gen., 527-528, 627. As may be seen by the cases cited in the following chapter, the courts have admitted to this category all laws of a local nature for the regulation of local intercourse and conduct.

[23] Particular groups of public laws according to this definition are taken up in other chapters where the conditioning factors are considered; see below, chs. iv, v, and vi. The Act for the Govern-

If the public laws of a ceding state cease to affect the ceded territory when there is a transfer of sovereignty, it is inconceivable that the public laws of any state other than the successor could apply. Perhaps this is the reason that the several treaties of annexation have not expressly stipulated that the Constitution and public laws of the United States shall immediately extend over the territory acquired. However, in the same treaties there are many intimations that as a result of the change of sovereignty such laws of the successor will automatically govern the region ceded.[24]

ing of Hawaii, April 30, 1900, 31 Stat. L. 141, ch. 339, gives a list of laws and regulations considered by Congress to be abrogated as contrary to the United States laws of public policy. Sec. 8 abolishes certain offices, Sec. 9 abolishes certain titles. Sec. 7 enumerates laws that are abrogated: Civil: promulgation of laws; flag and seal; diplomatic and consular agents; national museum; education of Hawaiian youths abroad; aid to board of education; Ministry of the interior; Government lands; board of commissioners of public lands; bureau of agriculture and forestry; agriculture and manufactures; Ramie; Taro flour; development of resources; agriculture; brands; patents; copyrights; railway subsidy; Pacific cables; hospitals; coins and currency; consolidation of public debt; post office; exemptions from postage; Postal Savings Bank; import duties; imports; ports of entry and collection districts; collectors; registry of vessels; customs house charges; elections; appointment of magistrate; jurisdiction; translation of decisions; clerks of court; juries; maritime matters; naturalization; habeas corpus; arrest of debtors; liens on vessels; garnishment; bankruptcy; water rights. Penal: treason; foot binding; violation of postal laws; blasphemy; vagrants; manufacture of liquors; offenses on the high seas; jurisdiction; procedure; imports; auction licenses; commercial travellers; firearms; coasting trade; peddling foreign goods; importation of live stock; quarantine; consuls and consular agents; whale ships; arrival, entry and jurisdiction; fraudulent exportation; masters and servants; immigration; agriculture and forestry; seditious offenses; sailing regulations. Session laws: elections; duties; exemptions from duties; registry of vessels; importation of livestock; the Pacific cable; consolidation of public debt; ports of entry; and Chinese immigration.

[24] Referring to: Art. III, Treaty of 1803 with France, Malloy, I, 508, which relates to the incorporation of the inhabitants according to the principles of the federal constitution, etc.; Art IV of the treaty of 1783 with Great Britain, ibid., I, 588, wherein it is stipulated that the creditors shall meet with no lawful impediment to the recovery of their money; Arts. V and VI of the Treaty of 1819 with Spain, ibid., II, 1653-1654, relating to incorporation of inhabitants, and the removal of their effects duty free; Art. III of the Treaty of 1867 with Russia, ibid., II, 1523, relating to the same and stating, "The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in

Undoubtedly, it is from this thought that the doctrine of the extension of the laws of the successor state to the acquired territory *ex proprio vigore* is derived. The American courts upheld this principle in several early decisions,[25] but apparently reversed their position in the famous Insular cases. They were able to make this reversal by confining the early decisions to the facts of the particular litigations, and refusing to extend the doctrine beyond those cases.[26] The same

regard to aboriginal tribes of that country." Art. VIII of the treaty of 1898 with Spain, ibid., II, 1692, relating to the description of what constitutes private persons, Art. IX regarding the status of inhabitants in the territories and Arts. X, XIII, XIV.

[25] See the cases cited below, note 20, in relation to the public laws of the new state governing the territory. Also note the implications in the rulings cited in: Blood v. Hunt, 121, So. 886: The laws of the United States became operative in the ceded territory on its transfer by Spain.

Wirt, I Ops. Atty. Gen. 483: Goods, water-borne until after the cession and delivery of Florida and not entered in Spanish customs are to be considered subject to the revenue laws of the United States; Brickell v. Trammel, 82 So. 221: East and West Florida held subject to the Constitution and public laws of the United States; Balzac v. People of Puerto Rico, 258 U. S. 298: Constitution is in force there as wherever United States sovereignty exists; Wagner v. Kenner, 2 Rob. 120: The commercial law of the United States became that of New Orleans on its cession from Spain; Griggs, 22 Ops. Atty. Gen. 578: On its annexation the registry laws of the United States applied to ships formerly registered from Hawaii; Ramos v. United States, 12 F.(2d) 761: Constitutional prohibition is held to apply to the island of Puerto Rico; Seward to Schofield, 80 MSS. Dom. Let. 220, felt that the revenue laws of the United States should extend *ex proprio vigore* to new territory; also see Rapp v. Venable, 110 P. 835; McKinnon v. Winn, 1 Okla. 327.

[26] Fleming v. Page, 9 How. 603; Cross v. Harrison, 16 How. 164; Cooley v. U. S., 182 U. S. 22; De Lima v. Bidwell, 182 U. S. 1; Downes v. Bidwell, 182 U. S. 244; Neeley v. Henkle, 180 U. S. 119; Armstrong v. U. S., 182 U. S. 243; Huus v. N. Y. & P. R. S. S. Co., 182 U. S. 392; Goetz v. U. S., 182 U. S. 221; Crossman v. U. S., 182 U. S. 221; Second Dooley Case, 183 U. S. 151; 14 Diamond Rings v. U. S., 183 U. S. 176; Hawaii v. Mankichi, 190 U. S. 197; Rassmussen v. U. S., 197 U. S. 516; Dorr v. U. S., 195 U. S. 138; Balzac v. Puerto Rico, 258 U. S. 298; Kepner v. U. S., 195 U. S. 100; Binns v. U. S., 194 U. S. 486; Warner Barnes & Co. vs. U. S., 197 U. S. 419; Lastra v. N. Y. & P. R. S. S. Co., 2 F.(2d) 812; Allen v. U. S., 47 F.(2d) 735; Gallardo v. Santine Fert. Co., 11 F.(2d) 587; Francis v. People, 11 F.(2d) 860; Nerius & Hesslein & Co. v. Edwards, 24 F.(2d) 989, 279 U. S. 872; People v. Fortuna Estates, 279 F. 500; Amiable Lucy v. U. S., 6 Cranch 330; Good v. Martin, 95 U. S. 90; In re Lane, 135 U. S. 443; U. S. v. Carr, Fed. Case No. 14,730; U. S. v. Seveloff, Fed. Case No. 16,252; Seton v. Hanham, R. M. Charlt. (Ga.) 374; Soto v. U. S., 273 F. 628; and

position was taken by Mr. Magoon, former Law Officer of the War Department, after a lengthy and exhaustive study of court decisions, legislative enactments, and congressional and executive opinions.[27]

The same authorities that questioned the doctrine of extension *ex proprio vigore* have established in its stead the ruling that the public laws of the United States can be and are extended over the acquired territory by the action of Congress. This action may take the form of legislation expressly extending the public laws over the territories, or through implication in acts "incorporating" the acquired districts.[28]

Because the courts have taken this position, there is an apparent conflict between two accepted principles. It has been found that the United States has consistently subscribed to the doctrine that the exercise of the legislative power over territories is regulated by the laws of the nation acquiring them. On the other hand, it appears that the public laws of the United States do not extend *ex proprio vigore* to the territories annexed, and that congressional action in respect to them is limited in most respects neither by the Constitution, nor by the so-called constitutional rights of the inhabitants of the territories.

Evidently it is inadequate to state categorically that the public laws of the United States either do or do not govern its relationship to the acquired districts. In order to explain the practice that has been followed, it is necessary to divide public laws into two categories: "grants" and "limitations." Then it may be said that the public laws of the United States to the extent that they are grants of power to Congress and other agencies to govern acquired territories, do extend *ex proprio vigore* over the annexed region. But the American public laws, to the extent that they are limitations on the power of Congress and other agencies to govern acquired

23 ibid. 370, 400, 644, 414, 634; 24 ibid. 40; and Magoon, pp. 37-173, for discussion and further citation of cases, pp. 60-70.

[27] See Magoon, discussion, pp. 37-173; in particular, pp. 89-114.

[28] See Rasmussen v. U. S., 197 U. S. 516, and Dorr v. U. S., 195 U. S. 138, as well as the discussion by Willoughby, pp. 223-234.

territories, do not extend *ex proprio vigore* over the annexed regions. Such laws of limitation are treated as a special privilege which may be extended to a region only by an act of Congress granting such regions the privileged status of statehood or incorporation; a status which the annexed territory does not acquire upon annexation *ipso facto*.[29]

The Jackson-Fromentin controversy which followed the annexation of Florida well illustrates this involved point. President Adams sent Jackson, garbed with certain powers, to the Florida territory to receive it from Spain and to govern it. These powers, probably for the sake of expediency, were the same in scope as those of the former Spanish governor. In the course of his administration, Jackson had a dispute with a Spanish military officer over the delivery of certain documents, and summarily clapped the latter in prison. Judge Fromentin of the territorial court attempted to rescue the Spanish officer and liberate him on a writ of *habeas corpus* (a constitutional right). Jackson refused to honor this writ on the ground that the Constitution did not extend to the territory of Florida. Judge Fromentin held that the Constitution, as the public law of the United States, extended *ex proprio vigore* to Florida on its annexation. On reference of this heated controversy to the President and his cabinet, the principle of *ex proprio vigore* extension was denied and Jackson's position was upheld.[30]

It is clear that Jackson received his powers from the President who, in turn, delegated powers which the Constitution permitted him to delegate. Neither Jackson nor the President received them from the Spanish Governor on the transfer of sovereignty. The Spanish Governor held his powers by

[29] This conclusion is based upon the examination of the above references wherein both judges and officials have spent much time and energy deriving the power of Congress to acquire and regulate territories from the Constitution, and yet, at the same time, demonstrating that most of the constitutional limitations on this power do not apply to Congress in the subsequent legislation for these territories.

[30] Magoon, pp. 137-140, citing the Annals of Cong., 17th Cong. 1st sess., II, 1374-1377, 2300, 2413, and Adams Memoirs, V, 366-380. These documents are all contained in Folio State Papers, 2 Miscellaneous, 799; and 21 Niles Register.

virtue of the exercise of the sovereign powers of Spain as delegated to him according to Spanish public law. Jackson held his by virtue of the public law of the United States. Yet Jackson, in his exercise of these powers in the territory, was not bound by the limitations placed on their use in the "States" and stipulated in the same document from which he derived them.

The confusion arising from the policy of the United States in regard to the extension of public laws to acquired territories may be dispelled if it is borne in mind that the problem may be viewed both from the standpoint of international law and from that of constitutional law. From the standpoint of international law, the decisions of the courts and the position of the government may be regarded as establishing the principle that the Constitution and laws of the United States do apply to the government of the territory annexed by the United States. From the standpoint of constitutional law, the United States has so interpreted its Constitution that only the grants of power to govern extend to the acquired regions, and the limitations on the use of this power may be extended solely by the express or implied action of Congress.[31]

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[31] See the following:

Iponmatsu Ukichi v. U. S., 281 F. 525, wherein it was held that Congress had extended all laws not inapplicable to Hawaii; U. S. v. British Schooners, 5 Al. 11, Congress extended the customs and navigation laws over all the territory and waters of Alaska;

Am. R. R. Co. of P. R. v. Dedricksen, 227 U. S. 145, the Safety Appliances Act of Mar. 2, 1903, was extended to Puerto Rico by the Foraker Act, Apr. 12, 1900;

U. S. v. Seveloff, Fed. Case No. 16,252: The Act of July 20, 1868, imposing a tax on distilled spirits being a general act and passed by the United States Congress since the acquisition, was in force in Alaska;

U. S. v. Carr, Fed Case 14,725: Rev. Stat. 5481, passed June 22, 1874, after the cession of Alaska, was in force from the time of passage;

Balzac v. People of P. R., 258 U. S. 298: Puerto Rico was not incorporated in the United States, but the review of courts, selling of stamps, attendance at West Point, and numerous statutes have been extended by Congress to that Island on and since its organization;

22 Ops. Atty. Gen. 268: Hawaiians are not entitled to the benefits of the U. S. copyright laws without affirmative legislation;

MacFarland v. Alaska Pers. Mining Co., 3 Al. 50: The Constitution and laws of the U. S. not locally inapplicable apply to the ter-

In support of the proposition that from the standpoint of international law the United States recognizes that its public laws extend *ex proprio vigore* over acquired territories, there are four distinct points. First, the pre-Insular case decisions adopt this doctrine. Second, there is the established principle that the powers granted to Congress by the Constitution to govern territories apply to annexed regions. Third, the thirteenth amendment to the Constitution forbidding slavery and involuntary servitude clearly stipulates that its force extends to all places "subject to the jurisdiction of the United States."[32] And fourth, there are the decisions that the limitations placed on the action of the government by the "fundamental personal rights," which were not "conferred" by the Constitution but merely "formulated" in it[33] (the once-called inherent rights of man to life, liberty and the pursuit of happiness) apply to the government in its relations with the annexed districts.

Even as the legislative power of a ceding state passes to an annexing state upon a state succession because it is an integral

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ritory of Alaska since the Act of May 17, 1884, organizing that territory;

Magoon, p. 50: "The United States has fashioned a uniquely complicated doctrine which applies to the extension of the power of Congress, the executive and judiciary over acquired territory. It seems that it may be argued that by Treaty, cession, discovery, a territory may become appurtaining to the United States but not within the boundaries of it." He held that the United States has received dominion over the territory but the privileges of United States citizens do not extend *ex proprio vigore* over it, but only through the act of Congress. On page 55 he held that the rule that seems to govern the question of the extension of the United States laws over any new territory is, "that wherever the sovereignty of the United States may be asserted, the Congress of the United States may prescribe the ways and means, the manner and methods by which such sovereignty is to be asserted." See also, pp. 50-84.

[32] Cf. Willoughby, Constitutional Law, p. 1209.

[33] Magoon, p. 87, "In dealing with the inhabitants of newly acquired territories, it is the spirit of the Constitution, the character of our institutions and the laws of humanity and civilization that impose restraints in the absence of treaty stipulations in this respect." Also ibid., pp. 85-87, citing Mormon Church v. U. S., 136 U. S. 42; Thompson v. Utah, 170 U. S. 345; Brown v. U. S., 8 Cranch 110; Johnson v. McIntosh, 8 Wheat. 543; Young v. U. S., 97 U. S. 39; Downes v. Bidwell, 182 U. S. 244. See 55th Cong., 3d sess., S. Doc. no. 62.

part of the exercise of the sovereign power, so also are the administrative, executive and judicial powers transferred with the change of sovereignty. Likewise the public laws of the old state which regulate the exercise of these powers cease with the transfer, and the public laws of the successor are substituted. Consequently, it would be expected in the case of successions involving the United States that upon the transfer of a territory Congress would either authorize the President to appoint such officials, to establish such government and tribunals as might be necessary for the proper control of the territory, or itself prescribe such organization, establish such tribunals, and define its status. Such has been the case.[34]

However, before all the necessary appointments can be made and the proper institutions established, some time may elapse between the time of the formal transfer of sovereignty and the actual substitution of the new personnel and organizations for the old. During this period, the officers and tribunals of the ceding state have been allowed to act as the agents of the successor for the purpose of keeping law and order in the region transferred. Consuls accredited to the old state have continued their functions,[35] although the

[34] See Joint Resolution No. 55, 7 July, 1898, 30 Stat. L. 750, annexing Hawaii: "Until Congress shall provide for the government of such islands, all the civil, judicial, and military powers exercised by the officers of the existing government in the said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have the power to remove said officers and fill vacancies so occasioned." Act Mar. 3, 1917, 39 Stat. L. 1132, ch. 171, for Virgin Islands; Act Oct. 31, 1803, 2 Stat. L. 245, ch. 1, for Louisiana; Act Mar. 3, 1819, 3 Stat. L. 523, ch. 93, for Florida; Act July 27, 1868, 15 Stat. L. 240, ch. 273, for Alaska. In the cases of Puerto Rico, the Philippines, and the Mexican cessions the authorities of the preceding sovereign were already replaced by the United States military authorities in occupation at the time of the cession. See note 38. See statement and citations made by Magoon, pp. 86 ff. See Acts of Congress cited, note 43, and Act of April 30, 1900, 31 Stat. L. 141, ch. 339. In the Act of March 3, 1917, 39 Stat. L. 1132, ch. 171, in regard to the Virgin Islands, it was said, "The same shall be administered by the civil officials and through the local judicial tribunals established in the said islands respectively; and the orders, judgments, and decrees of said tribunals shall be duly enforced."

[35] Hay to Grip, Nov. 17, 1898, MSS. Notes to the Swedish Leg. VIII, 109; Hay to the Sec. of War, Mar. 26, 1900, 244 MSS. Dom.

United States has extended its own consular protection to the new nationals located in foreign countries at the time of the cession.[36] In one case, a Spanish "intendant" was found capable of selling a land grant in Mexico after Mexico had separated from Spain, inasmuch as the seller had paid the money received into the treasury of the succeeding state.[37] Judgments of the courts of a ceding state are not affected by the cession, nor can their decisions be reviewed, if final, even in cases when the judgment is rendered after the signing of the treaty of cession.[38] It has also been held that cases pending before such courts before a cession may be concluded by them.[39]

By way of summary, it may be stated that when there is a transfer of sovereignty, it is well established that the legislative, administrative, executive, and judicial powers and the public domain of the old state pass to the new. On the other hand, the public laws of a ceding state which regulate the disposition and exercise of those powers cease to be in effect, and the public laws of the successor are substituted.

Let. 19; Hay to Allen, May 23, 1900, 245 MSS. Dom. Let. 232; Hay to the War Dept., Jan. 22, 1901, 250 MSS. Dom. Let. 341.

[36] Hay to Lushman, For. Rel. 1900, p. 905. Adee to Russell, For. Rel. 1899, Sept. 19, 1899; Hay in circular to all the consuls, For. Rel. 1900, p. 894.

[37] Ely's Administrators v. U. S., 171 U. S. 220.

[38] Magoon, pp. 486-489; Clement v. Texas, 273 S. W. 993; Art. XII of the Treaty of 1898 says of the judicial proceedings, "Judgments rendered either in civil suits between private individuals, or in criminal matters before the date mentioned and with respect to which there is no recourse or right of review under Spanish law, shall be deemed to be final, and shall be executed in due form by competent authority in the territory within which such judgments should be carried out. Civil suits between private individuals which may, on the date mentioned be undetermined, shall be prosecuted to judgment before the court in which they may be pending, or in the court that may be substituted therefor. Criminal actions pending on that date mentioned before the Supreme Court of Spain against citizens of the territory which by this treaty ceases to be Spanish, shall continue under its jurisdiction until final judgment; but such judgment having been rendered, the execution thereof shall be committed to the competent authority of the place in which the case arose."

[39] Also For. Rel. 1896, pp. 152-157, and For. Rel. 1897, p. 154.

CHAPTER III

Effect on Private Law and Private Rights

In every case of state succession the disposition of the private laws governing the relationship of individuals to individuals and the rights and obligations accruing to the inhabitants by virtue of such laws has been a major problem. The residents of the territories involved have, through their political, civil, social, and legal intercourse erected a mass of private rights and obligations controlled and protected by the laws of the ceding state. It is of vital importance to know whether or not such rights and obligations and the laws regulating them are annihilated by a change of sovereignty or assumed by the successor state.

Early in the history of the United States, Chief Justice Marshall stated the doctrine which has been consistently applied to the solution of this problem by the American courts:[1]

> The same act which transfers their country, transfers the allegiance of those who remain in it, and the law which may be denominated political is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State.

This principle has been restated many times since, sometimes in the form employed in the famous case of the Chicago and Pacific Railway versus McGlinn:[2]

> It is the general rule of public law recognized and acted upon by the United States that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws continue in force until abrogated by the new government or sovereign.

The numerous decisions in cases that have followed each acquisition of territory by the United States indicate that this doctrine is a fixed American policy.[3] Particularly is this true of the land grant cases, in which courts established by Con-

[1] American Insurance Co. v. Canter, 1 Pet. 511.
[2] Chi. & Pac. R. R. v. McGlinn, 114 U. S. 542.
[3] Leitensdorfer v. Webb, 1 N. M. 34, 20 How. 177; Davis v. Concordia, 9 How. 280; Harcourt v. Gaillard, 12 Wheat. 523; U. S. v. D'Auterive, 10 How. 709; Pollard's Lessee v. Hagan, 3 How. 212; U.

gress and acting under the authority vested in them by the Constitution have, time after time, applied the laws of the ceding states in determining the validity of grants and cessions made by officers of the preceding sovereign.[4]

This doctrine has been found applicable not only when

S. v. Reynes, 9 How. 127; Kinkead v. U. S., 24 Ct. Cl. 459, 150, U. S. 483; New Orleans v. U. S., 10 Pet. 662; Langdean v. Hayes, 21 Wall. 521; U. S. v. Roselius, 15 How. 31; U. S. v. Repentigny, 5 Wall. 211; Planter's v. Union Bank, 16 Wall. 483; U. S. v. Power's Heirs, 11 How. 570; U. S. v. Turner, 11 How. 663; Strother v. Lucas, 12 Pet. 410; Chi. & Pac. R. R. v. McGlinn, 114 U. S. 542; Airhart v. Massieu, 98 U. S. 491; Am. Ins. Co. v. Canter, 1 Pet. 542; U. S. v. Heirs of Rillieux, 14 How. 189; U. S. v. Percheman, 7 Pet. 51, 86; Ely's Adm. v. U. S., 171 U. S. 220, 231; Belez v. Naphtaly, 169 U. S. 353; Cross v. Harrison, 16 How. 164; Bevins v. Ramsey, 11 How. 185; More v. Steinbach, 127 U. S. 70, 80; Pan. R. R. Co. v. Bosse, 249 U. S. 41; Les Bois v. Bramell, 4 How. 449; Merryman v. Bourse, 9 Wall. 592; Handley's Lessee v. Anthony, 5 Wheat. 374; Holden v. Hardy, 169 U. S. 366; Kealoha v. Castle, 210 U. S. 149; Trono v. U. S., 199 U. S. 521; U. S. v. King and Coxe, 7 How. 833; Perez v. Fernandez, 202 U. S. 80, 95; U. S. v. Amistad, 15 Pet. 518; Phil. Sugar Estates Div. Co. v. U. S., 39 Ct. Cl. 225; Montault v. U. S., 12 How. 47; Wilson v. Wall, 6 Wall. 83; Soto v. U. S., 273 F. 628; People of Puerto Rico v. Fortuna, 279 F. 500; Jackson v. Porter, Fed. Case No. 7, 143; In re Chavez, 149 F. 77; Commonwealth v. Chapman, 13 Metc. 68; Chappell v. Jardin, 57 Conn. 64; White v. Moses, 21 Cal. 34; Welch v. Sullivan, 8 Cl. 165; Smith v. Reynolds, 9 App. D. C. 261; Clements v. Texas, 273 S. W. 993; Ferris v. Coover, 10 Cal. 589; Tischenmacher v. Thompson, 18 Cal. 11; Fowler v. Smith, 2 Cal. 39; McMullen v. Hodge, 5 Tex. 34; Stoneroad v. Beck, 120 Pac. 898; State v. Gallardo, 135 S. W. 664; 166 S. W. 369; Wagner v. Kenner, 2 Rob. 120; McGregor v. Comstock, 16 Barb. (N. Y.) 427; Jackson v. Lunn, 3 Johns Cases 109; Cong. of St. Francis v. Martin, 4 Rob. 62; McKennon v. Winn, 1 Okla. 327; Kenton v. Baroness of Montalba, 1 Rob. 343; Chew v. Calvert, 1 Miss. (Walk.) 54; Kelly v. Harrison, 2 Johns Cases 29; Seville v. Chretien, 5 Mart. 275; Wulfsohn v. U. S. S. R., 195 N. Y. Sup. 472; Craw v. Ramsey, Vaughan, 274; and the oft cited English cases; Preston's Case, 30 St. Tr. 944; Cooke v. Sprigg, Ap. C. 572; West Rand Gold Mining Co. v. King, 2 K. B. 391. Also this doctrine is upheld in the following documents and opinions: Magoon, pp. 11-19, 411-412, 467, 526; Dana's Wheaton, note 169; XXII Ops. Atty. Gen. pp. 150, 546, 249, 627, 631, 574; II ibid., 191; XXIII ibid., 93; For. Rel. 1803, II, 581, Delivery of Louisiana and Proclamation of Governor; For. Rel. 1901, 226; Adee to Rooker, 235 MSS. Dom. Let. 131.

[4] Rio Arriba Cattle Co. v. U. S., 117 U. S. 298; Florida v. Furman, 180 U. S. 402; Callsea v. Hope, 75 F. 758; Smith v. U. S., 10 Pet. 326; U. S. v. Kingsley, 12 Pet. 476; U. S. v. Pena, 175 U. S. 500; U. S. v. Santa Fe, 165 U. S. 675; San Francisco v. McDowell, 73 U. S. 363; Townsend v. Breeley, 72 U. S. 326; Ely's Adm. v. U. S., 171 U. S. 220; Peabody v. U. S., 175 U. S. 552; Brownsville v.

peaceful means have been employed in bringing about the transfer of territory but also when force has been used. A statement has been made by the political branch of the government to the effect that such laws, whether in writing or evidenced by the usages of the conquered or ceded country, continue in force until altered by the new sovereign.[5] This position has been strengthened by the ruling in Delassus versus the United States that:[6]

> The conqueror may deal with the inhabitants and give them what law he pleases, unless restrained by the capitulation, but until alteration be made the former laws continue.

It has likewise been established that the private rights created by these laws and the private property protected by them also continue to exist in spite of the change of sovereignty. The treaties of cession have usually specifically provided for the protection of individual rights not only in reference to property but also to life, liberty and religion.[7] In the case of the United States versus Percheman, it was declared that:[8]

Cavazos, 100 U. S. 138; U. S. v. Acosta, 1 How. 24; U. S. v. Cervantes, 18 How. 553; Faxon v. U. S., 171 U. S. 244, 249; U. S. v. Roselius, 15 How. 31; U. S. v. Chavez, 159 U. S. 452, 175 U. S. 509; U. S. v. Yorba, 1 Wall. 412; Whitney v. U. S., 181 U. S. 104; U. S. v. Reynes, 9 How. 127; Chouteau's Heirs v. U. S., 9 Pet. 145; Barry v. Gamble, 3 How. 32; Chouteaux v. Eckhart, 2 How. 373; Berger v. U. S., 168 U. S. 66; O'Hara v. U. S., 15 Pet. 275; U. S. v. Delespine, 15 Pet. 319; U. S. v. Lynde, 11 Wal. 632; U. S. v. Miranda, 16 Pet. 153; U. S. v. Piralta, 3 Wall. 434; U. S. v. Pico, 23 How. 321; U. S. v. Pillerin, 13 How. 9; U. S. v. Heirs of Rillieux, 14 How. 189; U. S. v. Rose, 23 How. 262; U. S. v. Sutter, 21 How. 170; Berrysea v. U. S., 154 U. S. 623; Crespin v. U. S., 168 U. S. 208; Fremont v. U. S., 17 How. 542, 563; Hayes v. U. S., 637; U. S. v. Coe, 170 U. S. 681; U. S. v. Hanson, 16 Pet. 196; U. S. v. McLaughlin, 127 U. S. 442, 448; Belez v. Naphtaly, 169 U. S. 353; U. S. v. Ortiza, 176 U. S. 422; Doe v. Esclava, 9 How. 421; Shively v. Bowlby, 152 U. S. 1, 50; U. S. v. Moreno, 1 Wall. 400; Glenn v. U. S., 13 How. 250; More v. Steinbach, 127 U. S. 70; White v. Moses, 21 Cal. 34; Lewis v. San Antonio, 7 Tex. 288; San Francisco v. U. S., 2 Sawyer 561.

[5] Sen. Doc. 140, 56th Cong., 2d Sess., p. 9, Sherman to Hay, MSS. Dom. Let. No. 364, November 16, 1897. See also in Wharton, Digest of International Law, I, 11 ff.

[6] Delassus v. U. S., 9 Pet. 117.

[7] Treaty of 1783, Arts. III, IV, V, Malloy's Treaties, I, 586; Treaty of 1794 generally, ibid., I, 590; Treaty of 1803, Art. III, ibid., I, 508; Treaty of 1819, Arts. V, VIII, ibid., II, 1651; Treaty of 1853, ibid., I, 1121; Treaty of 1867, Art. VI, ibid., II, 1521; Treaty of 1898, Arts. IX, X, XI, XIII, ibid., II, 1690.

[8] U. S. v. Percheman, 7 Pet. 51, 86.

A cession of territory is never understood to be cession of the property belonging to its inhabitants. The King cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself attempting a wrong to individuals, condemned by the practice of the whole civilized world. . . . It may be unworthy of remark, that it is very unusual even in cases of conquest for the conqueror to do more than displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; there relation to the ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory.

Mr. Sherman took the same view in an official opinion. He wrote:[9]

By the law of nations the rights and property of the inhabitants are protected, even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty with or without any stipulation to such effect. . . . The general principle is undisputed that the division of an empire works no forfeiture of a right to property previously acquired.

The decisions of the courts over the entire history of the United States agree with these statements and make the principle that the security of private rights is unaffected by a change of sovereignty one of the best authenticated in the legal manual.[10] So well established is this doctrine that the

[9] Sherman to Hay, Nov. 16, 1897, MS. Dom. Let. No. 364, in regard to the claims of B. R. Henry and others in the Fiji Islands. S. Doc. No. 140, p. 9, 56th Cong., 2d sess.

[10] U. S. v. Elder, 177 U. S. 104; U. S. v. Clarke, 8 Pet. 436; U. S. v. Arredondo, 6 Pet. 691; Carino v. Gov. of Phil. Is., 212 U. S. 449, 459; U. S. v. Percheman, 7 Pet. 51; Botiller v. Dominguez, 130 U. S. 238; U. S. v. Clarke, 16 Pet. 231; Int. Land. Co. v. Maxwell Land Co., 121 U. S. 325; 122 U. S. 365, 139 U. S. 589; Ainsa v. N. M. & A. R. R. Co., 175 U. S. 76, 79; Ainsa v. U. S., 161 U. S. 208; Jones v. McMasters, 20 How. 8; U. S. v. King, 3 How. 773; Astiazaran v. Santa Rita Land Co., 148 U. S. 80; Barker v. Harvey, 181 U. S. 481; U. S. v. Repentigny, 5 Wall. 211; Willcox v. Henry, 1 Dall. 69; Harcourt v. Gaillard, 12 Wheat. 527; U. S. v. Auguisolo, 1 Wall. 352; Strother v. Lucas, 12 Pet. 410; Merryman v. Bourne, 9 Wall. 592; Delassus v. U. S., 9 Pet. 117, 133; Leitensdorfer v. Webb, 20 How. 177; New Orleans v. U. S., 10 Pet. 662; Williams v. Henry, 1 Dall. 69; Kinkead v. U. S., 150 U. S. 483; U. S. v. Olvera, 154 U. S. 538; Airhart v. Massieu, 98 U. S. 491; Mut. Aid Soc. v. Watts, 1

courts have gone to the length of stating that private property and private rights are to be secured and protected on a succession of states, both when there is and when there is not an express stipulation to that effect in the treaty of cession.[11]

This principle has sometimes been stated in a slightly different form which may be derived from the doctrine of international law that third parties' interests are sacred and should not be affected by acts in which they had no part. It has often been asserted that the private rights of subjects of a nation not party to a change of sovereignty are not affected by such an event. This assertion has been adopted by the United States as a principle which has been applied to the protection of the interests of its citizens, both when America has been one of the parties to the transfer of territory, and when it has not.[12]

Wheat. 279; Coffee v. Groover, 123 U. S. 1, 10; Hart v. Burnett, 15 Cal. 530; Payne v. Treatwell, 16 Cal. 321; and the often cited cases of Campbell v. Hall, 1 Cowp. 204, 208; The Fama, 5 C. Rob. 106.

[11] United States v. Percheman, 7 Pet. 51, 86, "This article was apparently introduced on the part of Spain and must be intended to stipulate expressly for that security to private property which the laws and usages on nations would, without express stipulation, have conferred." This *obiter dictum* was upheld in: Am. Ins. Co. v. Canter, 1 Pet. 511; Strother v. Lucas, 12 Pet. 410; Johnson v. McIntosh. 8 Wheat. 543; U. S. v. Power's Heirs, 11 How. 570; Ainsa v. U. S., 161 U. S. 208; Delassus v. U. S., 9 Pet. 117, 133; U. S. v. Auguisolo, 1 Wall. 352; and U. S. v. Chaves, 159 U. S. 452, 175 U. S. 509. Cf. Willcox v. Henry, 1 Dall. 69; Harcourt v. Gaillard, 12 Wheat. 527.

[12] For. Rel. 1886, p. 333, nos. 163, 164, Feb. 22, 1886, and March 4, 1886, Alvansleben to Bayard to Alvansleben. Germany taking possession of the eastern part of the Caroline group declared it would respect the rights and interests of third parties, particularly private parties. The United States announced this doctrine to be held by it and in accord with its wishes.

For. Rel. 1886, p. 772, March 3, 1886, Bayard to Nogueiras, the rights of United States citizens in Sao Thomey to be respected. For. Rel. 1886, pp. 831-834, nos. 420, 424, Bayard to Valera, rights of American nationals in Caroline Islands to be respected. For. Rel. 1887, p. 131, July 28, 1887, no. 95, Hall to Bayard, rights given to United States shipping in Guatemala to continue. For. Rel. 1887, p. 419, the interests of United States citizens in the Solomon Islands to be respected on cession.

For. Rel. 1890, pp. 334-356, no. 350, Sept. 2, 1890, Wharton to Lincoln. On the annexation of New Zealand by Great Britain that state damaged much of the property of Mr. Webster, an American citizen, and the United States took a strong stand on the principle that a change of sovereignty should not affect private property.

However, in spite of the acceptance of these two doctrines, there have been cases where the consequences of a change of sovereignty definitely affected the rights of private persons. They have arisen in this manner: One of the effects of a transfer of territory is the change in the nationality of both the territory and the inhabitants. This has a direct effect on the status of the individuals in respect to the law of the land in which his property is located. An individual property owner may become an alien, subject to the privileges and disabilities of an alien, in two ways: his nationality may be changed by the transfer of sovereignty, whereas the nationality of the territory in which his property is located may remain the same; or, his nationality may remain the same, while that of the territory in which his property is located may change. Thus, when the rights of aliens and of citizens are not identical, the mere fact of a territorial reorganization affects the property owner's rights. This is illustrated by a number of cases in which the courts have first determined the nationality of the parties before them in order to determine whether the rights of those individuals are the rights of citizens or of aliens.[18]

For. Rel. 1892, p. 237, no. 951, Nov. 5, 1892, Foster to White, the rights of Americans were to be protected on annexation of Gilbert Islands to Great Britain.

For. Rel. 1895, pp. 739 ff. The United States investigated claims in the Fiji Islands arising from a transfer of them to Great Britain with a view to protecting the private rights acquired prior to the cession by American nationals.

For. Rel. 1901, pp. 677-685, correspondence relative to the protection of pre-existing rights of individuals in Korea. For. Rel. 1901, pp. 225 ff, British rights in Cuba acquired before relinquishment of sovereignty by Spain.

Also For. Rel. 1893, p. 319, and For. Rel. 1898, p. 287, in re Webster's Claims.

[18] A succession of states affecting the nationality of the inhabitants of a territory so as to make them aliens in respect to the country in which their property lies, renders those inhabitants under the common law unable to inherit: Inglis v. Trustees, 3 Pet. 99; Munro v. Merchant, 28 N. Y. 9; Shanks v. Dupont, 3 Pet. 342; McKinney v. Saviejo, 18 How. 235; Palmer v. Downer, 2 Mass. 180; M'Ilvaine v. Coxe, 4 Cranch 209; Kelham v. Ward, 2 Mass. 236; Crane v. Reeder, 25 Mich. 303; Manchester v. Boston, 16 Mass. 230; Den v. Brown, 7 N. J. Law 305; Chanet v. Villiponteux, 3 McCord 29 (South Carolina); Kilpatrick v. Sisneros, 23 Tex. 113; Cryer v. Andrews, 11 Tex. 170; Tannis v. St. Cyre, 21 Ala. 449; Barrett v. Kelly,

However, even after eliminating this particular type of case, the obligation placed upon the succeeding state to protect and secure individual rights cannot be construed so broadly as to burden the new state either with the duty of correcting wrongs committed by the preceding sovereign,[14] or with an obligation to indemnify the inhabitants for losses caused by the transfer itself.[15] Nevertheless, in the former case an exception may be made when the wrongful act of the ceding nation was so recent that the individual had no opportunity to appeal for redress.[16]

It is evident that the courts construe the principle generously, and apply it widely. Therefore, it becomes important to learn to a somewhat more definite extent what is included in the term "private property." Although a discussion of the term can be found in authoritative works on jurisprudence, it is necessary to determine its meaning when used in cases arising from a succession of states.

Title to land granted to legal individuals by preceding governments is perhaps the most common form of private property protected by the courts following a transfer of sovereignty. When such grants of title have been complete, definite, and validly made according to the laws under which they were given, they have been recognized and protected by the American judiciary.[17] In a few instances, even when the land

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31 Tex. 476; Fairfax v. Hunter, 7 Cranch 603; Brown's Case, 4 Cranch 209; Blight v. Rochester, 7 Wheat. 535; Contee v. Godfrey, I Cranch 479; Cawson v. Godfrey, 4 Cranch 321; U. S. v. Ritchie, 17 How. 525; Calvin's Case Coke VII, 3, 39; Allen's Case, Moore Int. Arb. I, 290.

Subsequent change of nationality from a change of sovereignty may affect other rights of the inhabitants: Fairfax v. Hunter, 7 Cranch 603, rights of devising; Fischer v. Herndon, Fed. Case No. 4,819, in forfeiture proceedings; For. Rel. 1901, p. 226, and XXIII Ops. Atty. Gen. 93, relative to a Spaniard dying in Cuba before the end of the term provided for electing Spanish nationality and his rights as such; 173 MSS. Inst. to Consuls 446, 465, correspondence between Cradler Johnson and Goodnow regarding the rights of Philippines in China.

[14] Cessna v. United States, 169 U. S. 165.

[15] Sanches v. United States, 42 Ct. Cl. 458.

[16] Cessna v. United States, 169 U. S. 165.

[17] U. S. v. Arredondo, 6 Pet. 691; Mortimer v. N. Y. El. R. R. Co., 6 N. Y. S. 898; Ketchum v. Buckley, 99 U. S. 188; U. S. v. Chaves, 159 U. S. 452; U. S. v. Vaca, 18 How. 556; Watts v. Ely Real Estate

granted to an individual by a ceding sovereign was situated in territory claimed by the United States at the time of the grant, the title of the individual has been confirmed. Confirmation of title in such cases has been made by the political department of the United States, inasmuch as the courts cannot declare a grant of land valid in opposition to the claims of the political department.[18]

Other individual titular rights of an executory, inchoate, imperfect, or equitable nature, have been neither destroyed nor confirmed by the change of sovereignty.[19] The courts have felt that action by the political department was necessary to make them perfect legal rights. Nevertheless, they have held that it was incumbent on them to protect such rights as they existed prior to the cession, inasmuch as they were within the term of private property:[20]

Co., 254 F. 862, 262 F. 721; Pollard v. Kibbe, 14 Pet. 353; Kenedy v. State, 231 S. W. 683, 258 U. S. 617; U. S. v. Breward, 16 Pet. 143; McMechen v. U. S., 97 U. S. 204; U. S. v. Waterman, 14 Pet. 478; U. S. v. Wiggins, 14 Pet. 334; Palmer v. U. S., Fed. Case No. 10, 697, 24 How. 125; Glenn v. U. S., 13 How. 25; Seneca Nation v. Appleby, 112 N. Y. S. 177; Harcourt v. Gaillard, 12 Wheat. 523; Haynes v. State, 85 S. W. 1029; also Cuellar v. State, ibid., Flores v. State, ibid., Garza v. State, ibid., Benevidos v. State, ibid., Pena v. State, ibid.; State v. Russell, 85 S. W. 288; and cases in notes 6, 10, and 11. Also I Ops. Atty. Gen. 563.

[18] Henderson v. Poindexter's Lessee, 12 Wheat, 530; Foster v. Neilson, 2 Pet. 253; Coffee v. Groover, 123 U. S. 1, 10; U. S. v. Reynes, 9 How. 127; U. S. v. Lynde, 11 Wall. 632; Montault v. U. S., 12 How. 47.

[19] Mitchell v. U. S., 9 Pet. 74; the Pueblo of Zia v. U. S., 168 U. S. 198; U. S. v. Sandoval, 167 U. S. 278; U. S. v. Rose, 23 How. 262; Soulard v. U. S., 4 Pet. 511; Delassus v. U. S., 9 Pet. 117, 133; De la Croix v. Chamberlain, 12 Wheat. 599; U. S. v. Lynde, 11 Wall. 632; Dent v. Emmeger, 14 Wall. 308; Ainsa v. U. S., 161 U. S. 208; Alexander v. Roulet, 13 Wall. 423; Smith v. U. S., 10 Pet. 326; Stoneroad v. Stoneroad, 158 U. S. 240; U. S. v. Kingsley, 12 Pet. 467; Ainsa v. N. M. & A. R. R. Co., 175 U. S. 76, 79; U. S. v. King, 3 How. 773; Les Bois v. Bramwell, 4 How. 449; U. S. v. Santa Fe, 165 U. S. 675; Welch v. Sullivan, 8 Cal. 165. Also cf. Act of Congress, June 22, 1880. Magoon, Reports, pp. 11-19 held that the inchoate rights granted by the former government that are incomplete at the time of the cession remain so after the annexation until regulated by the United States. Magoon, Reports, p. 531, held that one Mr. Usera received inchoate rights from the Spanish government which were to be protected as private property by the United States. He had the right after the cession to demand an auction of the transportation franchises in accordance with the old Spanish law regulating these affairs. See also Pillard v. Kibbe, 14 Pet. 353.

[20] United States v. Reynes, 9 How. 127.

> The term property . . . will embrace rights either in possession or in action, or that to which the title is not yet completed, but in either acceptation it can apply only to rights founded in justice and good faith and based on authority competent for their creation.

It was the policy of the Spanish and Mexican governments to make grants and concessions of land to individuals conditional upon the settlement and development of certain areas in return for the title to the land. Although this particular type of grant had no counterpart in the practice of the United States, it has been honored by American courts and considered to convey title to the grantees. Such has been the case only when such grants were validly made and the conditions were fulfilled or a good reason given for their non-fulfillment.[21]

Rights deriving from patents or licenses, copyrights, and even trademarks have been included in the category of private property. For example, Attorney General Griggs has held that the Spanish laws protecting industrial property continued in force for their self-imposed terms after the cession of the Philippine Islands to America.[22]

Other private rights such as those arising from claims either for damages because of the negligent sinking of a ship,[23] or for the restitution of certain deposits,[24] have been protected

[21] Int. Land Co. v. Maxwell Land Grant Co., 121 U. S. 325; 122 U. S. 365; Crespin v. U. S., 168 U. S. 208; U. S. v. Pena, 175 U. S. 500; U. S. v. Percheman, 7 Pet. 51, 87; U. S. v. Elder, 177 U. S. 104; Mitchell v. U. S., 9 Pet. 735; U. S. v. Vaca, 18 How. 556; U. S. v. Pillerin, 13 How. 9; U. S. v. Clarke, 9 Pet. 735; O'Hara v. U. S., 15 Pet. 275; U. S. v. Kingsley, 12 Pet. 476; Fremont v. U. S., 58 U. S. 241; 17 How. 542; U. S. v. Mills, 12 Pet. 215; U. S. v. Chaves, 159 U. S. 452, 175 U. S. 509; U. S. v. Clarke, 8 Pet. 436; De la Croix v. Chamberlain, 12 Wheat. 599; U. S. v. Clarke, 16 Pet. 231.

[22] Griggs held in XXII Ops. Atty. Gen. 617: "The law of Spain concerning industrial property of July 30, 1898, seems to be still in force. . . . A patent or license granted July 11, 1898, to a Spaniard for the manufacture of hemp by steam, etc., in the Philippine Islands for the term of five years is protected by Article 13 of the treaty with Spain, if on that date it would, in ordinary time, have been good under the Spanish law, notwithstanding American law gives no identical rights. The laws of Spain concerning industrial property were contemplated by the framers of Article 13 in providing protection for Spanish rights." And to the same effect, ibid., p. 351. Magoon, Reports, pp. 305-315: trademarks, patents, and copyrights were to be considered property and to be protected by the private property clause in the treaty of 1898.

[23] Magoon, Reports, p. 526.

[24] Ibid., p. 484.

by the United States in the same manner as they had been protected by the former sovereign. Even special liens on the soil,[25] rights arising from mining claims,[26] and the personal obligation of an inhabitant to perform military duty for which he enrolled prior to the cession,[27] have been considered valid and binding after the annexation.

An interesting group of rights have been excluded from this class. These are the rights that spring from hereditary or purchasable offices under the preceding sovereign.[28] It was held in Sanchez versus the United States that:[29]

> Treaty provisions [speaking of the stipulation for the protection of private property] have no reference to public or quasi public stations, the function and duties of which it is in the province of the government to regulate or control for the welfare of the people, even where the incumbents of such stations are permitted while in discharge of their duties to earn and receive emoluments or fees for services rendered by them. . . . If originally the claimant lawfully purchased in perpetuity, the office of Solicitor (Procurador) and held it when Porto Rico was acquired by the United States, he acquired and held it subject, necessarily, to the power of the United States to abolish it whenever it conceived that the public interest demanded that to be done.

There is also much legal dynamite in the term "private person." As in the case of the term "private property," it is necessary to examine cases dealing with state succession for the meaning of "private persons" as used by the courts. In the cases cited there has been no question concerning the inclusion of individuals and business corporations in this

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[25] Mutual Aid Society v. Watt's Executors, 1 Wheat. 279.

[26] Magoon, Reports, p. 351.

[27] For. Rel. 1900, p. 470, Hay to Storer, April 8, 1900, "A subsequent change of nationality does not operate to discharge the obligation if under Spanish law Llaveria was liable when enrolled March, 1898."

[28] O'Reilly de Camara v. Brooke, 142 F. 858, 209 U. S. 45, in re office of sheriff; Countess of Buena Vista v. U. S., Am. J. of Int. L. II, 678-688; Alvarez y Sanchez v. U. S., 216 U. S. 167, in re 'procurador'; Magoon, Reports, pp. 454 ff., the claims of Alvarez de Nava for the loss of the office of notary public were not allowed; Bosque v. U. S., 209 U. S. 91, the right to practice law was excluded by the court from the term of private property in the teaty of 1898.

[29] Sanchez v. United States, 42 Ct. Cl. 458, Am. J. Int. Law, IV, 463; see also article on "Purchasable Offices in the Ceded Territory," Am. J. Int. Law, III, 119.

category. However, when ecclesiastical bodies and municipalities have been involved, difficulties have arisen. This has been true because ecclesiastical bodies have often been subsidized by and closely connected with the state, and because municipalities have exercised a governmental function.

In the litigations following the Louisiana Purchase, the Mexican cession, and the Spanish cessions of 1898, the courts found that municipalities such as cities, towns, and pueblos, had certain property rights as corporate entities. These rights were treated by the tribunals as if they were the rights of private individuals. As such they were held by the courts both to continue unaffected by the cession and to be protected by the United States.[30]

The municipalities included in the Mexican cession were so organized that an "alcalde" (a governmental official corresponding in some respects to the mayor of an American city) could, by the issuance of an "ayuntamiento," alienate a portion of the land to which the "pueblo" had title. Such a right would appear to be a political or public one exercised by the local government and quite analogous to the power to alienate parts of the public domain accorded by Spanish public law to the monarch. If such a power were exercised by a king, it would cease with the cession of the territory over which he exercised it. Nevertheless, it was held in these municipal cases that the power of an "alcalde" to alienate the domain of a "pueblo" was not abrogated by a change of sovereignty.[31]

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[30] San Francisco v. Le Roy, 138 U. S. 664; New Orleans v. U. S., 10 Pet. 662; San Francisco v. U. S., 4 Sawy. 561; U. S. v. Santa Fe, 165 U. S. 675; Townshend v. Greeley, 72 U. S. 326; Lewis v. San Antonio, 7 Tex. 288; Cohas v. Raisin, 3 Cal. 443; Payne & Dewey v. Treadwell, 16 Cal. 221; White v. Moses, 21 Cal. 34; Welsh v. Sullivan, 8 Cal. 125; More v. Steinbach, 127 U. S. 70; Palmer v. Low, 98 U. S. 1; Merryman v. Bourne, 9 Wall. 592; Hart v. Burnett, 15 Cal. 550; Pueblo of Zia v. U. S., 168 U. S. 198; Grisar v. McDowell, 73 U. S. 263; Brownsville v. Cavajos, 100 U. S. 138.

[31] Magoon, Reports, pp. 374-375, "The situation is that the powers, rights, and privileges conferred upon the municipalities in Cuba by the Laws of Spain are found to be proper and right and are to be exercised and enjoyed by said municipalities acting through and by the municipal agents and officials duly elected by the inhabitants." Ibid., p. 388, "The municipalities of Cuba now possess the same

Upon what basis could such decisions be made? On the one hand, there is the principle that the royal power to alienate the public domain ceases with the transfer of sovereignty. On the other, there is the doctrine that the property rights of a private person are unaffected by a state succession. Obviously, the principle applied depends on where the line is drawn between a public person and a private person. The cases cited above established that municipalities chartered as corporate bodies act in the capacity of a private legal person and have the same right as a private individual to alienate property. Therefore, the doctrine that private property rights continue undisturbed by a change of sovereignty was applied.

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rights of property they possessed under Spanish sovereignty. Such property as a municipality could completely alienate under Spanish sovereignty is now subject to such disposition by the municipality. Such property as a municipality could charge with an easement amounting to a servitude in favor of a private person or concern is now subject to like action. As now constituted and administered, the municipalities of Cuba are permitted to exercise the ordinary rights of ownership over property unto them belonging." Ibid., p. 383, stated that municipalities' property was not part of the public domain. Ibid., pp. 408-412, citing opinions, which held that "The municipality of Manila is a municipal corporation and as such may be sued by the courts. The controversy . . . stands on the same footing as a like controversy between individuals. . . ." Ibid., p. 460, "Under Spanish sovereignty the municipalities of Porto Rico possessed the right to make loans and issue bonds therefor. Such rights as the municipalities possessed in matters of this character were retained upon the cession of the island to the United States. The rights of municipalities to enter into contracts and incur liabilities for the purpose of securing public improvement is in harmony with the character and institutions of our government. Upon the change of sovereignty being effected, this right did not cease, but the municipalities continue to possess it." (Citing Halleck, ch. 33, sec. 12; XXII Ops. Atty. Gen. 527; Am. Ins. Co. v. Canter.) Ibid., pp. 464-471, "If prior to the treaty of cession a municipality possessed property rights in and to its streets or other lands and possessed the power of alienation, such power would continue thereafter until changed by legislative authority." Ibid., p. 541, discussed the case of Vilas v. Manila, which held that the city may act in two capacities, as executive of the political power of the state, or as a legal person or corporation with vested rights. The former functions were abrogated by the change of sovereignty. The latter were protected and continuous. Ibid., p. 650, held to the same doctrine. Rights conferred on municipalities under Spanish law were to continue under the sovereign jurisdiction of the United States, and the exercise of them was to be determined later by the United States government. Ibid., p. 385. See Message of Pres. McKinley to Congress of Dec. 5, 1899, p. 9, on this point.

The cases arising from the Mexican cession formed the precendents for the decision of Vilas versus the City of Manila [32] which made a distinction between the corporate civil capacity of a municipality, and its function as an instrument of the state for the purposes of government. Justice Lurton wrote of the dual character of municipal corporations:

> They exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a governmental subdivision of the state. In the other character it is a mere legal entity or juristic person. In the latter character it stands wholly for the community in the administration of local affairs wholly beyond the sphere of public purposes for which its governmental powers are conferred.

Ecclesiastical bodies also have been given the character of a private juristic person for the sake of determining the continuance of their property rights.[33] In the treaty of 1867 for the cession of Alaska,[34] Article II stipulated:

> It is, however, understood and agreed, that the churches which have been built in the ceded territory by the Russian government shall remain the property of such members of the Greek Oriental Church resident in the territory, as may choose to worship therein.

There is yet another group of rights which may be included

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[32] Vilas v. the City of Manila, Trigas v. the same, Aguabo v. the same, reported 220 U. S. 345, 31 Sup. Ct. 416, and Scott's Cases 86. Also cf. Magoon 541, citing as to this distinction South Carolina v. the United States, 199 U. S. 437; Lloyd v. the Mayor of New York City, 5 N. Y. 369, 55 Am. Dec. 347; Western Savings Co. v. Philadelphia, 31 P. 175, 72 Am. Dec. 730. See also cases cited in note 30 above.

[33] Day to Sec. of Int., Sherman to same, 221 MSS. Dom. Let. 205; I Ops. Atty. Gen. 563; Pious Funds Case, Scott's Cases, p. 00; Congregation of the Roman Catholic Church of St. Francis v. Martin, 4 Rob. 12; Ponce v. Roman Catholic Church, 210 U. S., 246, 325, wherein it was held that the church was a corporate body and legal person whose title to temples was not affected by the fact that some of the funds came from a public source, and its private property rights were unaffected by a change of sovereignty; Berlin v. Ramirez, 7 Phil. Is. 57; Terrett v. Taylor, 9 Cranch 43; a corporation of British subjects chartered by the Crown had a capacity to hold land which was not affected by a change of sovereignty; U. S. v. Arredondo, 6 Pet. 691, 712; Australasia and China Tel. & Tel. Co. v. U. S., 48 Ct. Cl. 33, 45.

[34] Malloy's Treaties, II, 1522. Also cf. Article VIII of the Treaty of 1898, ibid., II, 1693, which provided for the protection of the property of provinces, municipalities, public or private establishments, ecclesiastic or civil bodies, or any other association having legal capacity to acquire and possess property.

in the discussion in this chapter for the lack of a better place to put them. These are the quasi public, or mixed rights which are gained by private individuals and business concerns contracting with the local, provincial, or national governing bodies for public services. They take the form of franchises, monopolies, and other exclusive rights of operation or construction.

Whether or not these contracts and the rights of the individuals flowing from them are recognized by the succeeding sovereign of the territory depends largely, in the case of the United States, upon the merits and circumstances of the individual case. The obligations and rights involved in a contract made for the benefit of the locality between a private person and the local government usually continue to exist undisturbed by the cession of the territory. This undoubtedly results from the conception of the municipality as a private corporation and legal person, which was put forward in Vilas versus City of Manila. The court pointed out that:

> Under the Spanish charter (and under the new charter) there was the power to incur debts for municipal purposes and the power to sue and be sued. The obligations here in suit were incurred under the charter referred to and are obviously obligations strictly within the provision of the municipal power. . . . The contention that the liability of the city upon such obligations was destroyed by a mere change of sovereignty is obviously one which is without a shadow of moral force.[35]

Most of the concessions and contracts involved in the cessions following the Spanish-American War were of a local nature, granted by the Spanish authorities in line with the needs of the locality. They included the grant of street railway franchises, local railway franchises, concessions for the use of the public domain, concessions for the construction of public works, and grants of exclusive rights in the maintenance and operation of telegraph and cable lines. The contracts of this type which were "complete" and which vested rights in the contractors were held valid by the American courts. However, the rights of the contractors were protected only if the contracts were validly made according to the re-

[35] Vilas v. City of Manila, 220 U. S. 345, opinion of Justice Lurton.

quirements of Spanish law.[36] On the other hand, if the rights flowing from these contracts were not "vested," that is, if the contract was an executory one, the rights of the concessionaire were purely equitable and were respected by the United States as such.[37] It was decided by the courts that concessions of the latter form existed only by the grace of the Spanish sovereign and required further action by the Spanish governors to make them complete. Such contracts could be confirmed, in the case of Cuba, by the action of the Cuban courts, and in the case of the acquired territories, solely by the action of Congress.[38] Inchoate and incomplete grants have been recognized as such by the United States courts, but have not been confirmed either by the act of transfer or the treaty of cession. Vested rights, arising from completed grants, have been respected, but when they have been held solely by the grace of the ceding sovereign or were made primarily for his benefit, the American courts have treated them as purely equitable rights.

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[36] The validity of the concession was to be judged by the Spanish law, Magoon, pp. 495, 579-595, in the case of M. Y. Dady and Co., and XII Ops. Atty. Gen., 310, 384, 526, to the same effect. The rights of the concessionaire, also, were to be determined according to the law under which they were gained, Magoon, pp. 432 ff., 630-646. 'Exclusive rights' defined as 'property,' XXII Ops. Atty. Gen. 514.

[37] A conditional concession for the use of the public domain was granted to Valdez, who fulfilled the conditions. He was held to have an equitable right which was respected by the United States, and moreover, which was confirmed by the issuance to him of a revocable license. Magoon, p. 495.

[38] Doria Case: concession depending upon the grace of the Spanish government is held only as a temporary right to be disposed of according to the public policy of the United States, Magoon, pp. 448 ff.

Arranjo's concession, given by the Spanish authorities to him to build a canal, cannot prejudice the vested rights of other persons though it was *prima facie* valid and binding in the American courts, ibid., pp. 571 ff.

De la Torre concession to build tramways in Havana was partly executed and made previously to the military occupation. Opinion given that it was valid, and such previously contracted grants transfer, XXII Ops. Atty. Gen. 520.

A concession for the construction of a tramway in Puerto Rico, being inchoate and incomplete and lacking certain public action necessary to be taken by the public authorities representing the Crown of Spain before it could go into effect as a completed grant, required the action of Congress to complete and confirm it, XXII Ops. Atty. Gen., p. 551. Also see ibid., pp. 546 ff.

CHAPTER IV

Effect on Nationality

Even before the time that it was a mark of distinction to be able to say, "I am a Roman citizen," individuals attached great importance to their nationality. A man's nationality often has been an integral part of his personality. When a change of sovereignty affects the nationality of the inhabitants of the territory transferred, the individuals concerned are likely to ascribe an importance to such an effect that they do not feel toward others. However, the determination of whether or not nationality is affected by a state succession is important to the inhabitants involved not only because they may have a sentimental attachment to their nationality, but also because the legal and political rights and duties of nationals and aliens differ in many instances. Further evidence of this importance is indicated in the number of cases that have come before the courts of the United States in which such questions have been involved.

If one should ask, at what time and by what means did the group known as American nationals come into existence, and who constituted the membership of this group, quite likely various and sundry answers would be given. The suggestions as to time and means would include the Declaration of Independence, the adoption of the Articles of Confederation, the Treaty of 1783 with Great Britain, and the adoption of the Constitution of the United States. As the basis for the selection of the constituents of the new nation, right of election, residence, adherence to the cause of the colonies, or the respective state legislative acts might be brought forward.

A clue to the answer of these questions may be found in the Declaration of Independence. In the first paragraph it stated,

> When in the course of human events it becomes necessary for one people to dissolve the political bonds which have connected with with another, and to assume, among the powers of the earth the

separate and equal station to which the laws of nature, and of nature's God entitle them, a decent respect to the opinions of mankind required that they should declare the causes which impel them to the separation. . . . We therefore, the representatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world, for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British Crown, and that all political connection between them and Great Britain, is, and ought to be, totally dissolved. . . . And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.[1]

It appears that by this declaration the inhabitants of the colonies dissolved the bonds of British allegiance and created the bonds of American nationality. However, the ambiguity of language, the lack of definition, and the subsequent legislative and personal acts, cast a doubt upon such a conclusion. In the first place, if the Declaration of Independence made all the inhabitants of the colonies American nationals, why did the various states feel the necessity of declaring the right of each state to the allegiance of all its inhabitants, and of altering by legislative act the nationality of all those who remained within its jurisdiction?[2] In the second place, did the term "the people" mean all the inhabitants, or the permanent residents, or those persons who possessed certain qualifications as to age, sex, property, education or opinion? In the third place, if it is assumed that by the Declaration of Independence all the inhabitants dissolved the bonds of British allegiance, the right of individuals to dissolve or elect nationality is implied. Such an implication in turn assumes that the status of nationality is a relation between the state and the individual which depends upon the will of the individual, be it expressed by word, by action, or by acquiescence. If this was the case, the right of election was implicit in the Declaration of Independence.

[1] U. S. Laws and Statutes, I, 7, 9.

[2] For example, see laws of New Jersey and New York referred to in M'Ilvaine v. Coxe's Lessee, 4 Cranch 209, and Inglis v. Trustees, 3 Peters 99, respectively.

As a matter of fact, not all of those residing in the colonies at the time favored the dissolution of their political ties with the British Empire and the creation of American bonds. Many of them went so far as to jeopardize both their lives and their property in the support of the British cause. Were these inhabitants American nationals?

The Articles of Confederation threw some light on these questions. They declared:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, except paupers, vagabonds, and fugitives from justice, shall be entitled to all the privileges and immunities of free citizens in the several states.[3]

However, although this statement signified that paupers, vagabonds, and fugitives from justice and unfree inhabitants were not entitled to the privileges of citizenship, it did not define, other than through implication, the "people" of the United States.

No specific definition of American nationals was included in any of the early treaties.[4] Nevertheless, it might be argued that the use of the terms "citizens," "inhabitants," and "people" interchangeably signified that the residents of the United States were its nationals. Such arguments are weak and unsatisfactory.

The same lack of definition may be found in an even more weighty document.[5] Chief Justice Waite has said:

> Looking at the Constitution itself, we find that it was ordained and established by the people of the United States. Whoever, then, was one of the people of either of these states when the Constitution of the United States was adopted, became ipso facto a citizen—a member of the nation created by its adoption. He was one of the persons associated together to form the nation, and was consequently one of its original citizens. As to this there never has been a doubt. Disputes have arisen as to whether or not certain persons or classes of persons were part of the people at the time, but never as to their citizenship if they were.[6]

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[3] U. S. Laws and Statutes, I, 14.
[4] See Malloy's Treaties for treaties with France, Spain and Prussia.
[5] Constitution of the United States, Preamble, 1 Stat. L., p. 10.
[6] Minor v. Happersett, 21 Wallace, 162-167.

The principle which the courts employed for determining who were "the people of the United States" was the right of election. This right can be derived from the Declaration of Independence itself. Chief Justice Marshall has said, "The right of election must necessarily exist in all revolutions like ours, and it is well established by adjudged cases."[7] To accept this statement it is only necessary to glance at the number of cases upholding the privilege of option.[8]

It may be objected, from a brief examination of the cases cited, that American nationality often was decided either on the basis of adherence to one cause or another, or on evidence of the residence of individuals at certain times, or on both adherence and residence. In support of this point there could be cited the statement of Marshall in Inglis versus Trustees:

> . . . Our doctrine is that by withdrawing from this country and adhering to the British government they lost, or perhaps, more properly speaking, never acquired the character of American citizens.[9]

However, this dictum did not controvert the principle of the right of election because adherence and residence were considered not as criteria for the determination of nation-

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[7] M'Ilvaine v. Coxe's Lessee, 4 Cranch 209.

[8] Inglis v. Trustees, 3 Peters 99; Doe v. Acklam, 2 Barn. and Cres. 779; U. S. v. Ritchie, 17 How. 525, 539; Blight's Lessee v. Rochester, 7 Wheat. 54; Gardener v. Ward, 2 Mass. 224 note; Kelham v. Ward, 2 Mass. 236; George v. Phipps., 2 Pick. 397; M'Ilvaine v. Coxe's Lessees, 4 Cranch 209; Lambert v. Paine, 3 Cranch 97; Contee v. Godfrey, 1 Cranch Ct. Cl. 479; Dawson v. Godfrey, 4 Cranch 321; Fairfax Devisee v. Hunter's Lessee, 7 Cranch 603; Minor v. Happersett, 21 Wall. 16207; On the basis of adherence or presumed election: Shanks v. Dupont, 3 Pet. 242; Jackson v. Lunn, 3 Johns Cas. 109; Kelley v. Harrison, 3 Johns Cas. 29; Andrew Allen's Case, Moore's Digest of International Arbitrations, I, 200; Crane v. Reeder, 25 Mich. 303; U. S. v. Repentigny, 5 Wall. 211; Phipps Case, 10 Mass. 394; Herbson v. Colchester, 5 Dagh. 69; Fisher v. Herndon, Fed. Case No. 4,819; Munro v. Merchant, 28 N. Y. 9; Lamoreaux v. Ellis, 5 N. Y. 812, and 89 Mich. 146; Den v. Brown, 7 N. J. Law, 305; Young v. Peck, 21 Wend. 389 (N. Y.); Orser v. Hoag, 3 Hill 79 (N. Y.); cf. with above citation, Ex Parte Dupont, 1 Harp. Eq. 5 (S. C.); Chanet v. Villeponteux, 3 McCord 20 (S. C.); Moore v. Wilson, 18 Tenn. (10 Yerg.) 406; Callais v. Marshfield, 30 Me. 511; Palmer v. Downer, 2 Mass. 180; Manchester v. Boston, 16 Mass. 230; Cummington v. Springfield, 19 Mass. 394; State v. Jackson, 65 A. 657, 79 Vt. 504.

[9] Inglis v. Trustees, cited above.

ality but as evidence of election. Adherence was a strong and overt evidence of choice, and residence a proof of an acquiescence in the state of affairs. It was true that an individual might lose the right of exercising his privilege of election either by continued residence in a country undergoing a change of sovereignty, or by the passage of a legislative act. However, the principle of election was not destroyed because this was true. The courts considered continued residence and acquiescence in a legislative act solely as evidence of the use of the right. This may be illustrated by Marshall's comment on the action of the court in the case of M'Ilvaine versus Coxe's lessee:

> The court in the case . . . fully recognized the right of election, but they considered that Mr. Coxe had lost that right by remaining in the State of New Jersey not only after she had declared herself a sovereign state, but after she had passed laws by which she declared him to be a member of, and in allegiance to, the new government.[10]

The doctrine that individuals have a right to choose their nationality on a change of sovereignty was not contradicted by the dictum given in Minor versus Happersett, that "whoever was one of the 'people' at the time of the adoption of the Constitution became *ipso facto* a citizen."[11] Nor was the principle impaired by the interpretation given to the word "people" by Gallatin, who wrote to Lowrie that in his opinion residence in the United States at that time made one

[10] Ibid. In the case referred to, a Mr. Coxe was born in the colony of New Jersey some time before 1776 and resided there until 1777, when he joined the British forces and thereafter adhered to the English cause, claiming to be a British subject. However, two months after the Declaration of Independence, he was still remaining in New Jersey when that state passed the law of October 4, 1776, pronouncing him to be a member of, and in allegiance to the new government. The court held that New Jersey was at that time a sovereign state and independent on the basis of the doctrine held by the United States that, so far as municipal regulation was concerned, said state was entitled from the time of the Declaration of Independence to all rights and powers of sovereign states, and that it did not derive them from concessions made by the British King. Therefore the court decided the law was valid and also a subsequent law describing him as a fugitive from justice with his lands subject to confiscation. See 4 Cranch 209.

[11] 21 Wallace 164-167.

a citizen of this country.[12] Such circumstances were also considered evidence of election. In fact, the courts carried the doctrine of the right of option to such a point that although minors generally were considered to follow the national character of the parents,[13] on reaching their majority they could regain, or gain, American nationality by exercising the right of election, either through returning to the United States,[14] or by disaffirming the election of the father within a reasonable time after the termination of minority.[15]

The period after which residence in the United States was considered evidence of the election of American nationality, and:

At which the American antenati ceased to be British subjects, differs here and in England, as established by the courts of justice in the respective countries. The English rule is to take the date of the Treaty of Peace of 1783. Our rule is to take that of the Declaration of Independence.[16]

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[12] Gallatin to Lowrie, dispatch of Feb. 19, 1824, in Gallatin's Writing, II, 287.

[13] Munro v. Merchant, 28 N. Y. 9; Manchester v. Boston, 16 Mass. 230. In the case of Contes v. Godfrey, 1 Cranch Ct. Cl. 479, a child of a native born American citizen residing in Maryland, though the birth took place outside of Maryland, was held to be a Maryland subject. In Brown's Case, 4 Cranch 209, a child born in Virginia in 1784 of a citizen of Virginia, though the child resided elsewhere at the time of the case, was held to be a U. S. citizen. Shanks v. Dupont, 3 Peters 242, held that a daughter of an American citizen and born in the colonies, who remained, was an American citizen; however, in the case of a second daughter, born in America, and who remained in the country until 1782, when she married a British officer and removed to another country, the court held that if she was of age when she left the country her native birth and residence in the United States signified her election of American citizenship, but if she was not of age her nationality was that of her father.

[14] Calais v. Marshfield, 30 Me. 511.

[15] Inglis v. Trustees, 3 Peters 99.

[16] Those cases which followed the American doctrine as to point of time were: Blight v. Rochester, 7 Wheaton 54; U. S. v. Ritchie, 17 How. 525, 539; Fairfax v. Hunter, 7 Cranch 603; Andrew Allen's case, Moore's Digest of International Arbitrations, I, 200; Dawson v. Godfrey, 4 Cranch 321; Contee v. Godfrey, 1 Cranch Ct. Cl. 479; Brown's Case, 4 Cranch 209, note; Inglis v. Trustees, 3 Peters 99; Shanks v. Dupont, 3 Peters 242; M'Ilvaine v. Coxe's Lessee, 4 Cranch 209; Calais v. Marshfield, 30 Me. 511; Young v. Peck, 21 Wend. 389; Munro v. Merchant, 28 N. Y. 9; Chanet v. Villeponteux, 3 McCord. 29; State v. Jackson, 65 A. 657, and 79 Vt. 504; Lamoreaux v. Ellis, 50 N. W. 812; Fisher v. Herdon, Fed. Cas. No. 4,819; Manchester v. Boston, 61 Mass. 230. Ainsley v. Martin, 9 Mass. 454, is the only

Jay's Treaty of 1794 explicitly gave the right of election to the settlers of the Northwest. It stipulated that they must declare their intention of remaining British subjects within one year of the date set for the evacuation of the British, or be considered as having opted for American nationality.[17] This provision definitely supported the earlier presumption that residence, in itself, was an evidence of election. The strength of this presumption was illustrated in the case of Crane versus Reeder, wherein the court held that the recording of a resident's choice was necessary for him to remain a

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case which denies the right of election, but it holds all those present at the time of the Declaration of Independence became American citizens.

Those American cases which appear to have applied the British doctrine were: Palmer v. Downer, 2 Mass. 180; Kelham v. Ward, 2 Mass. 236; Cummington v. Springfield, 19 Mass. 349; and Den v. Brown, 7 N. J. Law 305. All of these cases held that anyone adhering to the British cause *after* the beginning of the revolution were British subjects. Inglish v. Trustees, 3 Peters 99, also held that later adherence to the English side rebuts evidence of election for American nationality based upon residence at the time of the Declaration of Independence. Orser v. Hoag, 3 Hill 79, held that an antenati leaving this country in July, 1783, and never returning was not to be considered an American citizen. More v. Wilson, 18 Tenn. 406, determined that one domiciled in America before the close of the revolution was a United States citizen. In Cummington v. Springfield, 19 Mass. 394, a British soldier made prisoner by the American forces and who chose residence in the United States after his discharge was held to have the status of an American citizen. Cf. Case of Jared Shattuck, 2 Cranch 64, 119, and VIII Ops. Atty. Gen., 139-167, which held persons who were born in the colonies and remained until after the Declaration of Independence, then removed to the Danish West Indies were United States citizens until by overt act they chose Danish nationality.

[17] Malloy's Treaties, I, 591, Art. II of Jay's Treaty reads, ". . . All settlers and traders within the precincts or jurisdiction of the said posts, shall continue to enjoy unmolested all their property of every kind, and shall be protected therein. They shall be at full liberty to remain there, or to remove with all, or any part of their effects; and it shall also be free to them to sell their lands, houses, or effects, or to retain the property thereof, at their discretion; such of them as shall continue to reside within the said boundary lines, shall not be compelled to become citizens of the United States or to take the oath of allegiance to the government thereof; but they shall declare their election within one year after the evacuation aforesaid. And all persons who shall continue there, after the expiration of the said year, without having declared their intention of remaining subjects of his Britannic Majesty, shall be considered as having elected to become citizens of the United States."

British subject and that in the absence of such proof of election, he was to be considered as having become an American citizen.[18]

The adoption and practice of this rather liberal doctrine by the United States at such an early period is of interest. At that time the older nations still considered population and territory as the patrimony of the state. Even Great Britain still subscribed to the doctrine of perpetual allegiance, and denied the right of expatriation. The American principle was a new departure, and the logical result of the "rights of man" of the republican theorists so popular in the United States in that period.

What happened to the nationality of the inhabitants of Louisiana and of Florida when these territories were ceded to the United States is not clear. The vague wording of the two treaties of cession might give the impression that the nationality of the residents was not changed by the cession. Other documents not only throw little light on the question, but through implication tend to reenforce this impression.[19]

Article II of the Treaty for the Cession of Louisiana provided that:

> The inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted, as soon as possible,

[18] Crane v. Reeder, 25 Mich. 303. Other cases in relation to the points concerned and upholding the doctrine of the treaty: U. S. v. Repentigny, 5 Wallace 211; Hebron v. Colchester, 5 Dag. 169; Lamoreaux v. Ellis, 89 Mich. 146; and the opinion of Wirt in the case of Jacques Porter, V Ops. Atty. Gen. 716.

[19] By the Act of October 31, 1803 (2 Stat. L. 245, ch. 1, sec 2) the President was empowered to set up a government for "maintaining and protecting the inhabitants of Louisiana in the free enjoyment of liberty, property, and religion." On the same day Louisiana was delivered by Lussat to Claiborne and Wilkinson without any mention of the status of the residents (Am. Stat. Pap. 1803, II, 581). Gov. Claiborne's Proclamation uses the same ambiguous wording of the treaty, "that the inhabitants thereof will be incorporated into the United States of America and admitted as soon as possible, etc." (Am. Stat. Pap. 1803, II, 582.) The region was made a territory by Act of March 3, 1803 (2 Stat. L. 229, ch. 27).

In the case of Florida, the Royal Order of Evacuation dealt with this question in the same way as did the treaty of cession (For. Rel. 1820, IV, 748). The Act of Congress of March 30, 1822, which provided for the incorporation and government of Florida did not deal with the problem (3 Stat. L. 654, ch. 13).

according to the principles of the Federal Constitution, to the enjoyments of all the rights, advantages, and immunities of citizens of the United States; and *in the meantime* they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.[20]

This provision was clarified by the ruling of Chief Justice Marshall, that:

> The same act which transfers their territory, transfers the allegiance of those who remain in it. . . . The treaty is the law of the land and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of citizens of the United States. They do not, however, participate in the political power; they do not share in the government, until Florida becomes a State.[21]

This opinion seemingly denied the doctrine of the right of election. However, there are vestiges of the principle in the phrase "transfers the allegiance of those who remain in it," in the absence of legislation preventing the inhabitants of Louisiana from removing themselves from the territory.[22] In this case the right could be exercised only through removal from the territory.[23]

The joint resolution by which Texas was absorbed by the United States was silent on the problem.[24] In Boyd versus Nebraska, the court declared that the inhabitants were col-

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[20] Malloy's Treaties, I, 109. (Italics are author's.)

[21] American Insurance Co. v. Canter, 1 Peters 511-542. See also Tannis v. St. Cyre, 21 Als. 449; Boyd v. Thayer, 143 U. S. 135-164; Dred Scott v. Sanford, 19 How. 393, 535; Des Bois Case, 2 Marten 185; U. S. v. Taverty, 3 Marten 133; In re Harrold, 1 Clark 214.

[22] Treaty of 1819 with Spain, Malloy's Treaties, II, 1654, Art. V: "The inhabitants of the ceded territories shall be secured in the free exercise of their religion, without any restriction, and all those who may desire to remove to the Spanish dominions shall be permitted to sell or export their effects at any time whatever, without being subject in either case, to duties."

Art. VI: "The inhabitants of the territory which His Catholic Majesty cedes to the United States, by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States."

[23] In De Baca v. U. S., 27 Ct. Cl. 482, it was held that neither the treaty of 1803 nor that of 1819 affected or changed the citizenship of persons living in the disputed territory between the Iberville and Perdido Rivers. Spanish subjects continued to remain such and their children followed their nationality.

[24] H. J. Res. No. 8, March 1, 1845, 5 Stat. L. 797.

lectively naturalized when Texas was admitted to the Union.[25] On the other hand, in Contzen versus United States, the application of the doctrine of collective naturalization was limited to exclude those inhabitants not citizens of the state of Texas at the time of its annexation.[26] Attorney General Akerman supported both the principle of collective naturalization and the limitation of its application. He stated that there were three classes of individuals who were "citizens of Texas": first, residents in Texas on the date of its declaration of independence, except those leaving that country and aiding or adhering to the enemy (Mexico); second, those born in the Republic during its independence; and third, those naturalized by Texas. He added that those born abroad who sought passports as citizens of the United States and whose claim was founded on Texan citizenship at the time of its annexation, might be deemed entitled to passports as such, should they be found to belong to any of the classes of Texas citizens described above.[27] This opinion was applied and upheld by numerous court decisions.[28]

Article VIII of the treaty of Guadalupe Hidalgo explicitly accorded the right of election to the inhabitants of the ceded territories:[29]

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[25] Boyd v. Thayer, 143 U. S. 135-168, citing: Dred Scott v. Sanford, 19 Howard, 393, 525; Des Bois Case, 2 Marten 185; and U. S. v. Taverty, 3 Marten 733.

[26] Contzen v. U. S., 179 U. S. 191. The case also stated that an alien minor who had resided in Texas less than six months before the admission of that state into the Union, and was not resident at the time of the declaration of independence, and had never taken oath of allegiance to Texas, was neither a citizen of Texas at the time of its admission, nor "one of the people" of Texas who became citizens of the United States without naturalization irrespective of the nationality of his parents.

[27] XIII, Ops. Atty. Gen., 307.

[28] Contzen v. U. S., see above, note 29; Barrett v. Kelly, 31 Texas 476, McKinney v. Vaviego, 18 How. 235; Moore's Int. Arbs., III, 2541; Goldbeck's Case, ibid., III, 2507; Eigendorff v. Mexico, decision of the Mex. Comm. No. 581, Vol. I, 366; Ortmann v. Baldwin, 6 Wall. 116; Jones v. McMasters, 20 Howard 8; Cryer v. Andrews, 11 Texas 170; Hardy v. De Leon, 5 Texas 211; Schubens Case and Cabazos v. U. S., in Moore's Int. Arbs., III, 2542 and 2543; Barclay et al., Moore's Int. Arbs., III, 2536; Massen's Case, Moore's Int. Arbs., III, 2543.

[29] Malloy's Treaties, I, 1111 and 1112. It will be noted that Arti-

Those people who prefer to remain in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty, and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans shall be considered to have elected to become citizens of the United States.

However, Article IX of the same treaty contained the vague clauses of the earlier conventions, which guaranteed protection to the residents of the territory and stated that they would be incorporated and admitted to the Union with the privileges and immunities of citizens.[30] If the ruling of Marshall in American Insurance Company versus Canter is applied, it is true, in this case as in the others, that the inhabitants of the acquired territories became nationals on the transfer of sovereignty, but nationals without certain privileges, rights, and immunities usually exercised by citizens of the United States.[31]

Although the courts upheld the right of election, granted by the treaty, they clung to the presumption that residence in the acquired territory after the signing of the treaty was an election of American nationality.[32] Some courts took a liberal attitude towards the amount of evidence necessary to indicate a choice of Mexican nationality,[33] but others did not and required either specific forms or indubitable proofs of election to be submitted.[34]

The treaty of 1867 for the cession of Alaska modified the doctrine through extending the time and limiting the means of election. It provided that:[35]

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cles VIII and IX of the treaty were held to apply in the case of Gadsden's Treaty of 1853, ibid., p. 1123, Art V.

[30] See Art. IX, ibid., and also the protocol of Queretaro, ibid., p. 1119.

[31] S. Doc. 140, p. 9, 56th Cong., 2d sess.: "When New Mexico was conquered by the United States it was only the allegiance of the people that was changed."

[32] People v. De la Guerra, 4 Cal. 311; People v. Nagle, 1 Cal. 152, or 52 Am. Dec. 312; Tobin v. Walkinshaw, McAllister 186; U. S. v. Ritchie, 17 Howard 525; De Baca v. U. S., 37 Ct. Cl. 482; Vallejos v. U. S., 35 Ct. Cl. 489.

[33] Quintara v. Tompkins, 1 N. M. 29.

[34] Carter v. Territory, 1 N. M. 317.

[35] Treaty of 1867, Art. III, Malloy's Treaties, II, 1523. In sup-

> The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance may return to Russia within three years, but if they prefer to remain in the ceded territory, they, with the exception of the uncivilized tribes, shall be admitted to the enjoyment of the rights, privileges, and immunities of citizens of the United States.

A question arose as to the status of the aborigines excepted from the above provision. Inasmuch as the treaty also stipulated that: [36]

> The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country,

the courts held that such individuals were to be regarded as American nationals, though not permitted the rights of citizenship. The significance of this exception and ruling will be seen later.

The absorption of Hawaii and the incorporation of Texas were similar in one way. Both states were completely, territorially speaking, annexed by the United States by joint resolutions. No need existed for granting the right of election, inasmuch as there was no separate Texan or Hawaiian state after the succession. They were dissimilar in that Texas was admitted to full-fledged statehood, and the principle of collective naturalization which is applicable when a state is admitted applied to her inhabitants. Such was not the case with Hawaii, which never has been admitted as a state. Hawaii did not become an "organized territory" until nearly two years after the annexation.[37]

Hawaii was "annexed as a part of the territory of the United States . . . subject to the dominion thereof," and certain immigration laws were extended over its territory by the Joint Resolution of July 7, 1898. It may be assumed that Hawaiians became American nationals so far as allegiance

port of this doctrine see: The case of H., Evarts to Stoughton, No. 23, October 29, 1878, M. S. Instr. to Russia, XVI, 65; and In re Minook, 2 Alaska 200.

[36] Kie v. U. S., 27 Fed. Rep. 351.

[37] Hawaii was incorporated by the Joint Resolution of July 7, 1898 (30 Stat. L. 750), but it was the Act of April 30, 1900 (31 Stat. L. 141, ch. 339) that provided a government for the island.

and administrative purposes were concerned.[38] That the inhabitants of the Hawaiian Islands did not gain the status of United States citizens by the joint resolution was implied in the Act of April 30, 1900, for the establishment of a government for Hawaii, which declared:[39]

> All persons who were citizens of the Republic of Hawaii on August 12, 1898, are hereby declared to be citizens of the United States, and citizens of the territory of Hawaii.

This provision would have been unnecessary if the joint resolution in itself had given the inhabitants this status.

Many complicated problems arose from the cessions of the Treaty of 1898 with Spain. The nationality of the inhabitants of those territories was one of them. In regard to this subject, Article IX of the treaty provided:[40]

> Spanish subjects, natives of the Peninsula, residing in the territory over which Spain, by the present treaty, relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in

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[38] Joint Resolution No. 55, July 7, 1898, 30 Stat. L. 750. On page 751 it was provided that "there shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States."

[39] Act of April 30, 1900, 31 Stat. L. 141, ch. 339, sec. 4. Some question arose as to the effect that this Act would have on the Chinese of Hawaii who were citizens of that country. It was held that by the provisions of this Act a Chinese person born or naturalized in the Hawaiian Islands prior to the annexation of that territory, and who had not since lost his citizenship, was a citizen of the United States, and moreover, the wife and children of naturalized Chinese were entitled to enter the territory by virtue of the citizenship of the husband and father, (XXIII Ops. Atty. Gen. 345; ibid., XXII, 353; ibid., XXII, 578; ibid., XXIII, 352; and in the Case of Lam Chung, Hay to Conger, For. Rel. 1901, pp. 130-132). As to the nationality and registry of vessels, the Attorney General said that the issuance of registry to a vessel entitling it to carry national colors is an act of sovereignty, although the register itself is not the only document recognized by the law of nations as indicative of the ship's national character. He felt that the Hawaiian authorities could not in anywise certify as to the national character of a vessel, as Hawaiian national character could no longer be attributed to vessels owned by inhabitants of the islands (XXII Ops. Atty. Gen. 578).

[40] Malloy's Treaties, II, 1693.

default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside. The civil and political status of the native inhabitants hereby ceded to the United States shall be determined by the Congress.

It may be observed that the right of election given by the treaty of cession was offered to a particular group of individuals only, namely, "Spanish subjects, natives of the Peninsula." According to the treaty, the inhabitants of the ceded islands adopted the nationality of the territory in which they resided. But what was the nationality of their respective territories?

In the case of Cuba, America had possession of the island, furnished what government existed there, and protected Cubans abroad.[41] The United States acted as the trustee of the territory for the people of Cuba.[42] However, by the Joint Resolution of April 20, 1898, the American Congress resolved that the people of Cuba were, and of right should be, free and independent, disclaimed any intention of exercising sovereignty over the islands, and proposed to leave the government and control of the island to its people.[43]

Evidently the protection and aid given by the governmental agencies of the United States to the people of Cuba was not that of a government to its nationals, but that of an ally to a distressed sister state. In the case of Betancourt versus Mutual Reserve Fund Life Association, the court, basing its de-

[41] See Magoon generally and: Adee to Russell, Sept. 19, 1899, For. Rel. 1899, p. 766; Hay's circular to the consuls, May 2, 1899, For. Rel. 1900, p. 894; Hay to Spain, 23 MSS. Instr. to Spain, 28; Hay to the War Dept., December 28, 1900, 250 MSS. Dom. Let. 13; Hay to the War Dept., Mar. 16, 1899, 255 MSS. Dom. Let. 490. A Cuban with a Cuban passport, who went to Spain was not prevented by the United States from fulfilling a military service obligation to Spain, on the ground that he contracted the duty previous to his change in nationality in accordance with the Spanish law, Hay to Storer, For. Rel. 1901, pp. 469-470; For. Rel. 1901, pp. 226-231. In the Case of Don Ramon Marti y Buguet, it was held that by Art. IX of the Treaty of Paris of 1898, a Spaniard born in the Peninsula, who died in Cuba before the expiration of one year from the ratification of the treaty, was, in contemplation of the treaty, a Spanish subject at the time of his death (XXXIII Ops. Atty. Gen. 93).

[42] Art. I of the Treaty of 1898.

[43] Joint Resolution of April 20, 1898, 30 Stat. at L. 738.

cision on the Joint Resolution of April 20th and the Treaty of 1898, found that Cubans were free and independent and not citizens of the United States within the Act of 1889. Moreover, the judge went on to declare that there was nothing in Articles I, IX, or XIV, of the Treaty of 1898 which lent any color to the proposition that a Cuban was not a foreign born citizen.[44]

Puerto Rico, the Philippines, and the other islands were definitely ceded to the United States. By the treaty, Spain not only relinquished her sovereignty over them, but passed it to America, with the provision that Congress was to determine the civil and political status of the inhabitants.[45]

In the light of this transfer of power, together with the absence of any organized government in these islands other than American, the nationality of the territories does not seem doubtful. Nevertheless, there arose a great deal of litigation concerning the status of the natives of the islands. The Insular cases have caused much grief to litigants, courts, and students of law, because of the variety and complexity of the viewpoints taken and the arguments utilized. It can be said safely that these Insular cases held the islands were

[44] Betancourt v. Mutual Reserve Fund Assn., 101 Fed. Rep. 305. The Spanish policy regarding the citizenship of natives of the islands is given in the Royal Decree of May 11, 1911, which stated that natives of the territories relinquished or ceded by Spain, and still resident there who had lost Spanish citizenship through the operation of the Treaty of 1898, could recover that citizenship by the regular naturalization process described in their civil code; that officials in the territory who continued in the Spanish service after the cession retained their Spanish citizenship; that natives of the islands, etc., residing abroad at the time of cession, retained Spanish citizenship unless, within a year, they registered an express declaration to the contrary; all others lost Spanish nationality; that Spanish subjects born outside those territories but resident there at the time of transfer and losing their Spanish citizenship by the operation of the treaty could recover it by conforming with the procedure of Article 19 of the civil code; that persons who had not been permitted to register their option according to the treaty, could do so within one year from the date of that decree at any Spanish consular office; and that all those exercising the privileges of other citizenship, or office, than Spanish could be admitted only by the naturalization process. (For. Rel. 1901, p. 476.)

[45] Treaty of 1898, Articles II and III. See also Art. IX, second paragraph: "The civil and political status of the native inhabitants hereby ceded to the United States shall be determined by Congress."

part of the "United States" for some purposes, and were not for others.[46] Viewed from the standpoint of allegiance and nationality, and for the purposes of the naturalization and immigration laws, the decisions established that the inhabitants of the islands were American nationals.[47] Confusion arose only when the question of "citizenship," with its rights and duties under various laws and regulations of the Federal government was considered.[48]

Although the Insular cases determined that the natives of

[46] De Lima v. Bidwell, 182 U. S. 1; Gonzales v. Williams, 192 U. S. 1; Goetz v. U. S. 103 Fed. Rep. 72; 182 U. S. 221; Downes v. Bidwell, 182 U. S. 244; Dooley v. U. S. 182 U. S. 222; also Dooley v. U. S., 183 U. S. 151, and others.

[47] De Lima v. Bidwell, 182 U. S. 1: "The cession of Puerto Rico definitely transferred the allegiance of the native inhabitants from Spain to the United States."

Gonzales v. Williams, 192 U. S. 1: the court held that a native of Puerto Rico who was an inhabitant of that island at the time of its cession to the United States, on his arrival in New York, was not an alien immigrant within the act of Congress for the deportation of alien immigrants likely to become public charges. It further held that Puerto Ricans not born in the Peninsula, remaining in Puerto Rico could not, through the Treaty, elect allegiance to Spain, for by the cession their allegiance became due to the United States, which was in possession and had assumed the government, and they became entitled to its protection, i. e., that the "nationality" of the island became American instead of Spanish. See also: Hay to the War Dept., 242 MSS. Dom. Let. 443; Hay to Lushman, For. Rel. 1900, p. 905; Hay circular to the consuls, For. Rel. 1900, p. 894; Bosque v. U. S., 209 U. S. 91.

[48] Goetz v. U. S., 103 Fed. Rep. 72: "Their status at the time of cession was, as declared by the Supreme Court, that of inhabitants of a foreign country as regards the Constitution of the United States and within the meaning of the tariff acts. The treaty of cession did not change that status. And *as Congress had not acted* at the time of this importation, Puerto Rico was still a foreign country *in the sense of the tariff law*, and duties were lawfully assessed on the articles imported therefrom." (Italics are author's.)

Ex parte Ortiz, 100 Fed. Rep. 955, related only to the purpose of extending the right of jury trial in criminal prosecutions to Puerto Rico.

Cradler to Johnson and Goodnow, 173 MSS. Instr. to consuls, pp. 446, 468, related to Philippinos not having the extraterritorial rights of United States citizens in China pending legislation.

"Seamen born in the Philippines are not citizens within the meaning of any of the Statutes concerning seamen of the United States." For. Rel. 1901, pp. 199-200, and XXIII Ops. Atty. Gen. 370.

Also see Downes v. Bidwell, 182 U. S. 244; Dooley v. U. S., 182 U. S. 222 and 183 U. S. 151; Griggs, Atty. Gen. 370; Adee to Vilas, 247 MSS. Dom. Let. 448; Hill to Lenderlink, For. Rel. 1901, p. 32.

the islands were American "nationals," they held that the inhabitants were not "citizens." It is immediately evident that there was a distinction between the two terms.[49] It was not a new distinction, made only in the cases arising from the Treaty of 1898. It was implied in the earlier cases and explains some of the ambiguity of the language used in the early treaties.

The Articles of the Confederation excepted paupers, vagabonds and fugitives from justice from the provisions entitling all inhabitants of the colonies to citizenship. However, the courts held that all residents remaining within, or adhering to the cause of the United States were American citizens. The contradiction is only explained by the misuse of the word citizen to cover both nationality and citizenship.[50]

In the cases of Louisiana, Florida, New Mexico and Alaska, the inhabitants who elected or who were presumed to have elected American nationality gained that status. As soon as possible after the transfer of the territory the residents were to be admitted to the rights and immunities of United States citizenship. But, meanwhile, they were not accorded one of the most important privileges of citizens: participation in the political power, and a share in the government. The ambiguity of the language can be explained only by a distinction between "nationals" and "citizens."[51]

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[49] "The United States had the sovereign and undisputed right to provide in the treaty with Spain that all citizens of Puerto Rico should at once become citizens of the United States, but it was not done. . . . The right claimed by the relator depends upon the express proof that the rights of full citizenship are conferred; and it cannot be upheld solely on the broad claim that the Constitution follows the flag, or the claim that in the United States there can be no subjects. If it were a case in which the relator was sought to be deprived of life, liberty, or property without due process of law, as required by the fundamental law of the United States, a different question would be presented." J. Freedman. In the Frank Juarbe Case in the Superior Court of New York, cited by Morse, XIV, 262, Har. Law. Rev.

[50] A. P. Morse in two articles, "Civil and Political Status of Inhabitants of Ceded Territories," Har. Law. Rev., XIV, 262, and "The Status of Inhabitants of Territory Acquired by Discovery, Purchase, Cession, Conquest, etc.," Am. Law. Reg., XLVIII, 332, has pointed out a distinction between the inhabitants' political and civil status, but has not developed the idea of a distinction in their political status.

[51] Cf. the statement of Judge McAtee of the Supreme Court of

When Texas was admitted, it came as a state and therefore there was no need of such a distinction. On the other hand, the Hawaiians, though they became American nationals by the Joint Resolution of annexation, did not become citizens until the Act of April 12, 1900. The aborigines of Alaska, the Puerto Ricans and the Filipinos, were not admitted to citizenship but transferred their allegiance to the United States.

It is evident that a change of sovereignty transfers the allegiance of the inhabitants of the territory ceded. In other words, a change of sovereignty brings about a corresponding transfer of nationality. However, the status of citizenship has been regarded as a different proposition. The privileges and immunities of a citizenship granted by a ceding nation fall to the ground on a change of sovereignty, except when that citizenship may be retained through election by the inhabitants. Citizenship in the United States has been considered a particular status in relation to the government, and its privileges do not automatically accrue to the residents of the territory transferred. Such status can be acquired only by the instrument of cession, or the legislative act of Congress.

When an acquired territory is organized, a local government set in motion, and a grant of local franchise is made by Congress, the resident American "nationals" gain the privileges of participation in the local government.[52] When

Oklahoma, before the Oklahoma Bar Association, when he said, "And while to us here residing in a territory belonging to the United States the blessings of liberty, including the constitutional, personal and civil guarantees of liberty, have been so fully distributed that we have failed to observe the fact, while we claim citizenship in the United States, that we are not, in fact, citizens of that United States which is created by the Constitution; that we do not participate in the election of a President, of senators, or of representatives in Congress, and that, since the Constitution itself provides only for the election of a President, or senators, and representatives, and for the creation of a 'judicial power of the United States,' that yet while the Congress has conceded to us as a territory the privilege of electing a delegate who shall sit upon the floor of Congress and advise and serve concerning the interests of the territory from which he is sent, that yet, under the provisions of the Constitution, Congress itself has no power to give that delegate a seat," cited in Morse, Har. Law. Rev., XIV, 268.

[52] Act of April 12, 1900, 31 Stat. L. 77-135; ch. 191, sec. 7: "All

the acquired territory is incorporated into the United States, the new American nationals are accorded the protection and privileges of all of the laws of the nation.[53] The final step occurs when the acquired territory is admitted as a state and the citizens may participate in the election of the President, senators, and representatives.[54]

Nationality is in the nature of a civil right, although issuing from a political relation between the state and the individual.[55] In return for his allegiance the individual receives protection for his life, property, and the pursuit of his business. On the other hand, citizenship may be termed a political public right, for it deals with the particular individual as a public being with certain privileges in the political life of the community and nation. The former status changes with the transfer of sovereignty. The latter falls to the ground and is only recreated by the act of the new government.

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the inhabitants continuing to reside there who were Spanish subjects on the 11th of April, 1899, and then resided in Puerto Rico, and their children born subsequent thereto shall be deemed and held to be citizens of Puerto Rico, and as such entitled to the protection of the United States." See also Magoon generally and: XXIII Ops. Atty. Gen. 370; ibid., XXIII, 37; Adee to Vilas, 247 MSS. Dom. Let. 448; Hay to Lenderlink, For. Rel. 1901, p. 32.

Act of July 1, 1902, 32 Stat. L. 691, ch. 1369, sec. 4, which provided for the government of the Philippines and made all those inhabitants of the islands who were Spanish subjects of the 11th of April, 1899, citizens of the Philippine Islands and entitled to U. S. protection. Also XXIII Ops. Atty. Gen. 414, and the report of the Philippine Commission.

[53] Joint Resolution No. 55, July 7, 1898, 30 Stat. L. 750, annexing and incorporating the Hawaiian Islands, and the Act of April 30, 1900, 31 Stat. L. 141, ch. 339, organizing the government of the Islands.

[54] Joint Resolution No. 8, March 1, 1845, 5 Stat. L. 797, admitting Texas into the Union as a State.

[55] Tobin v. Walkinshaw, McAllister 186, is an interesting case illustrating this point. A. was a British subject by birth who removed to California while it was a Mexican territory, and became naturalized there. The question arose as to whether he was made a United States citizen by the treaty of cession, although he had not availed himself of the election clause. The court stated that on the transfer of a territory, the political relations between the inhabitants and the former government ceased and new ones arose with the new government. It though that A.'s status as a Mexican citizen depended on the political relation arising from his statutory naturalization, that this relation ceased with the ejection of the government under which he had gained it, and, therefore, he reverted to his former British nationality.

CHAPTER V

Effect on Public Debts and Financial Obligations

The problem of the transfer and disposition of the debts and financial obligations of a state undergoing a change of sovereignty is, perhaps, the most discussed of all the questions relating to the field of state succession. This discussion, unfortunately more often than not, is carried on in vague, sweeping terms and involved general theories flowing from a variety of premises, with the object of attempting to dispose of the whole complicated problem with a single dogma. Some of the difficulties in dealing with this topic arise from the number of angles from which it may be approached, the number of distinctions that may be employed in clarifying it, and the wealth of legal maxims, often contradictory, that may be applied.

At the Paris Conference of 1898 the Spanish Commissioners claimed that the monetary payments made by the United States in the purchase of Florida, Louisiana, Alaska, and in the Mexican settlement, indicated that the United States subscribed to the principle that a state acquiring the territory of another assumes its obligations.[1] The American Commissioners denied this position emphatically:

> In none of those cases does it appear that the United States assumed any debts. The money paid by the United States was paid for the territory.[2]

It is true that the assumption of public obligations was not the principal problem in the earlier negotiations. They were conducted for the expeditious settlement of outstanding diplomatic and military controversies.[3] However, the declaration that the money paid by the United States was paid for

[1] S. Doc. 62, p. 89, 55th Congress, 3d sess., Memorandum of the Spanish Peace Commission, Paris, October 26, 1898; Moore's Dig. of Int. Law, I, 365, 366.

[2] Ibid., p. 105, Memorandum of American Peace Commission, Paris, Oct. 27, 1898; Moore's Dig. of Int. Law, I, 372.

[3] Cf. John H. Latané, American Foreign Policy.

the territory, does not preclude the use of these treaties of cession as precedents for the adoption of the doctrine should the United States ever wish to employ it. Certainly money paid by a state to discharge part of the public debt of its predecessor, in order to acquire part of its territory, is "money paid for the territory." Such payment is similar to the American practice of settling the claims of its citizens against a ceding state.[4]

The attitude of the United States toward the assumption of public debts played no great part in the settlement which followed the separation of the colonies from England.[5] At that time most of the discussion concerning debts was confined to the protection of the private debts and obligations of American and British subjects existing prior to the separation.[6]

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[4] Treaty with France of 1803 and attendant Conventions, Malloy's Treaties, I, 508, 511, 513. Art II of the second convention of that date provides for the assumption by the United States of debts due United States citizens by the government of France to the amount of twenty million francs.

Treaty with Spain of 1819, Malloy's Treaties, II, 1651. By Arts. IX and XI the United States assumed the claims of its citizens against Spain to the amount of five million dollars.

Treaty with Mexico of 1848, Malloy's Treaties, I, 1107, Arts. XII, XIV, and XV. By these articles, provisions were made for the assumption by the United States of claims of its citizens against Mexico to the extent of three and a quarter million dollars.

Treaty with Mexico of 1853, Malloy's Treaties, I, 1121, Art. III.

Treaty with Russia of 1867, Malloy's Treaties, II, 1522. By Art. VI the United States paid seven million two hundred thousand dollars for the cession of Alaska free from all obligations.

[5] It was claimed by the Spanish Commissioners at the Paris Conference that the United States had actually paid Great Britain some fifteen million pounds sterling for extinguishing the colonial debts. I have not been able to locate any such statements. The American Peace Commission also could not find the publicists referred to, and denied the existence of such a historical proposition.

[6] Such debts were unaffected by either the war or separation. The Treaty of 1783, Malloy, I, 588, provided in Art. IV: "It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted." Also see discussion in Moore's Int. Arbs., I, 271-298. It was held in Ware v. Hylton, 3 Dall. 199, that the Treaty of 1783 nullified the Virginia law sequestrating a private debt due the enemy. See Discussion in Allan Nevins, "During and After the Revolution," pp. 644-655.

Samuel Chase went to England soon after the peace settlement and

The policy of the United States in regard to this problem first became a major issue when the Texan Republic was annexed in 1845. Texas had maintained its existence for several years as a sovereign, independent republic, and had contracted a public debt. This debt consisted of two distinct classes of public loans which had been authorized by the Texan Legislature.[7] The first class consisted of bonds and certificates of stock the value of which, computed with interest to July 1, 1850, and scaled down according to the Texan scale of depreciation, equalled $3,798,795. The second class included Texan promissory notes, claims under the Act of March 20, 1848, audited drafts, arrears for supplies and other unliquidated obligations, which, when similarly scaled down, totalled $3,048,527.23. The total indebtedness of the Republic was therefore approximately seven million dollars on July 1, 1840.[8]

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managed to recover the $650,000 of the investment by Maryland in the stock of the Bank of England. See McSherry, History of Maryland, p. 310.

Lawful impediments, however, were placed in the way of the recovery of debts owed to British creditors and Art. VI of Jay's Treaty provided for the assumption by the United States of the compensation for such bona fide debts. (Malloy's Treaties, I, 594, and Bemis, Jay's Treaty.) By a Treaty of 1802 the United States paid $2,664,000 to Great Britain for the settlement of such claims according to the awards of the commission set up by Jay's Treaty. (Malloy's Treaties, I, 611.)

[7] See the opinion of Atty. Gen. Caleb Cushing in VI Ops. Atty. Gen., pp. 130-147; H. Mis. Doc. No. 17, pp. 12-23, 33d Cong., 2d sess.; Moore's Dig. of Int. Law, I, 344-346.

[8] The Texan Acts creating these debts are cited in VI Ops. Atty. Gen. 131-138, and in Secretary of the Treasury Corwin's Report to the President, of Sept. 13, 1851, in H. Mis. Doc. No. 17, pp. 4-11, 33d Cong., 2d sess., and S. Mis. Doc. 72, 32d Cong., 1st sess.

The data compiled in Mr. Corwin's Report and quoted in Mr. Cushing's Opinion:

Bonds and Certificates of stock, computed value of July 1, 1850, Under:

Act of July 7, 1837	$1,651,590.00
Nov. 18, 1836	
May 16, 1838	
Jan. 22, 1839	
Jan. 14, 1840	
Feb. 1, 1840	2,582,902.00
Act of Feb. 5, 1840, stocks	1,628,936.00
Feb. 5, 1840, bonds	1,472,918.00
Total	$7,336,346.00

For the redemption of these loans the faith and credit of the Texan Government were solemnly pledged.[9] In some cases, duties on imports and the sale of public lands were specifically pledged as guarantees[10] of the loans. However, it was held that such express stipulations did not limit the application of these sources of revenue to particular loans.[11] The Act of February 5, 1840, provided:

> For the redemption of all loans negotiated by the authority of the Republic of Texas, independently of the reservation of the sinking fund, the proceeds of the sale of public lands, its revenues, and public faith are solemnly pledged.[12]

This has been interpreted to include loans negotiated both theretofore and thereafter.[13] Further, it has been established that such a pledge of the revenues of a government whose organic form admitted the power to raise revenue by duties on imports, was a special pledge of duties on imports as well as all the other sources of taxation known to that government.[14] Hence, it may be said that there existed in Texas a public debt secured by a lien on all its revenues collectively and individually.

At the time of the negotiation of the unratified treaty of 1844 for the annexation of the Texan Republic, the United States was prepared to assume payment of the Texan debt.[15] President Tyler declared[16] that by this treaty:

Reduced to scale of value furnished by Texas...	$3,798,795.00
The total public debt of Texas was estimated to be...	$12,435,982.00
And when reduced to scale.....	6,847,322.00
Therefore the amount of the public debt excluded from settlement by the Act of 1850, which included the issues of Treasury notes, arrearages, audited drafts and other unliquidated debts was.....	$5,099,046.00
Reduced to scale.....	3,048,527.00

[9] VI Ops. Atty. Gen. 132.
[10] Ibid., pp. 131-136, and Corwin's Report.
[11] Ibid., p. 136; and Corwin's Report, p. 78.
[12] Cited, ibid., p. 137.
[13] Ibid., pp. 137-138.
[14] Ibid., pp. 134-135; and Corwin's Report, p. 77.
[15] Br. For. and State Pap., XXXIII, 202, 204; S. Doc. No. 14, p. 341, 28th Cong., 1st sess.
[16] Pres. Tyler's 4th Annual Message, Dec. 3, 1844, Richardson's Messages, IV, 344; and Moore, Dig. of Int. Law, I, 343, 344.

The United States assumed the payment of the debts of Texas to an amount not exceeding $10,000,000, to be paid, with the exception of a sum falling short of $400,000, exclusively out of the proceeds of the sale of her public lands. We could not with honor take the lands without assuming the full payment of all incumbrances upon them.

However, the joint resolution annexing Texas expressed a different policy. It provided that Texas:

Shall retain all the public funds, debts, taxes, and dues of every kind which may belong to, or be due and owing to said republic; and shall also retain all vacant and unappropriated lands lying within its limits to be applied to the payment of the debts and liabilities of the said Republic of Texas and the residue of the said lands, after discharging said debts and liabilities, to be disposed of as the said State may direct; but in no event are said debts and liabilities to become a charge upon the Government of the United States.[17]

By the Act of September 9, 1850, the boundaries of Texas were limited and fixed. In return for the relinquishment of claims to large sections of territory excluded from Texas, for the cession of certain public properties, and for a waiver of all claims against the United States for the debts and liabilities of the erstwhile republic, the Federal Government agreed to pay Texas ten million dollars. However, the Act provided that half of the payment, five million dollars in bonds, should remain unpaid:

Until the creditors of the state holding bonds and other certificates of stock of Texas, for which duties on imports were specially pledged, shall first file at the Treasury of the United States releases of all claims against the United States for, or on account of, said bond or certificates in such form as shall be prescribed by the Secretary of Treasury and approved by the President of the United States.[18]

This provision was applicable only to those bonds and other certificates of stock of Texas for which duties on imports were specially pledged. The obligations which were not so described were excluded, perhaps inadvertently. Mr. Cushing pointed out:

In the resolution offered by Mr. Clay which led to the act, the phraseology employed was, 'That it be proposed to the State of Texas that the United States will provide for the payment of all

[17] H. J. Res., No. 8, of March 1, 1845, 5 Stat. at L., 797.
[18] 9 Stat. at L. 446, and Moore's Dig. of Int. Law, I, 344.

that legitimate and bona fide public debt of that State, contracted prior to its annexation to the United States, and for which the duties on foreign imports were pledged by the said State to its creditors.' Why [the wording was changed] I do not know; suffice it for me, that the change was made so as to limit very much the scope of the releases required by the United States.[19]

Although the American Congress, by the Act of 1850, indicated that some of the money paid for the land ceded by Texas to the Federal government should be applied to payment of the debts of Texas, it was held that: [20]

It by no means follows that the United States have assumed any liability thereby, or impliedly recognized the existence of any liability on their part; nor that any the less readiness will be shown by the proud and wealthy State of Texas to fulfill the engagement in regard to her debts contained in the compact of her admission to the Union. A public creditor, like a private creditor has a general right to receive payment out of the property, income, or means of his debtor. A special pledge of this or that source of revenue, of this or that direct tax, or indirect tax, when made by a government, renders such sources of revenue like a mortgage or deed of trust given by a private individual to his creditor, a specific lien, a fixed incumbrance, which the government ought not, in justice to the creditor, to abolish, or lessen, or alienate, until the debt has been satisfied. But a public creditor, like a private one, even as to debts not secured by hypothecation of specific property, or express lien, ought not to deprive himself of the means of payment; as the two governments, that of Texas and of the United States, abundantly indicated, as well by the compact of annexation, as by that for the change of boundaries.

This opinion did not expressly state whether or not the United States was liable for the debts of Texas. An interpretation of this opinion by Mr. Upham, the American member of the British-American Claims Commission, indicated that it established such liability in part.[21] It may be stated that the opinion recognized the doctrine that a public debtor should not deprive himself of the means of paying his obligations. Further, Mr. Cushing interpreted the act of Congress as a recognition of an equitable right of the creditors to payment, rather than a recognition of any legal liability on the part of the United States.[22]

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[19] VI Ops. Atty. Gen. 140.
[20] Ibid., pp. 142, 143.
[21] Moore, Dig. of Int. Law, I, 346, and S. Ex Doc. No. 103, pp. 406-408, 34th Cong., 1st sess.
[22] VI Ops. Atty. Gen. 142, 143.

The opinion of Mr. Corwin, Secretary of the Treasury, was more explicit. In his report to the President, he declared: [23]

> It is obvious, from the most careless perusal of the law, that Congress considered the United States as liable to pay all that portion of the debt of Texas for the redemption of which "duties on imports" had been pledged by the laws of Texas. Upon no other hypothesis is there any justifiable motive for requiring releases to the United States to be filed for such claims, before Texas should receive the last five millions of stock to be paid her. The laws (of nations) all proceed upon the idea that the moral obligations of independent states are binding once they attach to compacts between States, or between States and individuals, and that they never cease except by the voluntary agreement of the parties interested, or by their fulfillment and complete discharge. Hence, where an independent power contracts obligations and is afterwards, by the act of another power jointly with herself, incorporated into and subjected to the dominion of the latter, whereby the national responsibility of the former is destroyed, and the means of fulfilling her obligations transferred to the latter, all such obligations, to the extent at least of the means thus transferred, attach with all their force to the nation to whom such means have been so transferred.

A group of memorialists representing the Texan bondholders agreed with Mr. Corwin's statement: [24]

> Congress admitted the liability of the general government to pay all that portion of the public debt of Texas [on which duties on imports were pledged] and laid its hand upon five millions of stock provided for as security that Texas should pay that portion of her debt, or, on her failure to do so, the five millions thus withheld should be a fund out of which that class of the creditors of both Texas and the United States should be paid in whole or in part, as the relative amount of such debt and fund reserved should determine.

A majority of the House Committee of Ways and Means concurred in the views expressed in the memorial. The minority were of the opinion that the only liability of the United States to pay any portion of the debt of Texas arose solely from the consideration that, by the terms of the act, the United States became bound to pay Texas the five million dollars in bonds on the filing of the creditors' releases.[25]

Congress finally passed the act of February 28, 1855,[26] which provided that $7,750,000 should be paid by the United

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[23] Mr. Corwin's Report, H. Mis. Doc. No. 17, p. 5, 33d Cong., 2d sess.

[24] Memorial of creditors of Texas, ibid., pp. 24-27.

[25] Committee Report, ibid., pp. 27-28.

[26] 10 Stat. L., 617-619, cited in Moore's Dig. of Int. Law, I, 347.

States Treasury pro rata to the holders of those bonds or other evidences of debt found to be within the Act of 1850 by either the report of Mr. Corwin, or the opinion of Mr. Cushing. This sum was a compromise between the total face value of the debt reported in the categories provided for by Mr. Cushing and Mr. Corwin as $12,435,982.68, and the total debt as scaled down according to the laws of Texas, computed at $6,847,322.23.[27]

Meanwhile, the Texan legislature, by the Act of January 31, 1852,[28] had provided for payment on the "audited paper," "miscellaneous liabilities," the second class debt, the third class debt, and the accounts audited under special legislative act, which were excluded from the category of bonds and certificates of stock. However, the treasury notes were not provided for in these acts. It is therefore evident that the United States and Texas were acting in concert to cause the debts of the latter to be paid, and that Texas was not exonerated from the debt.[29]

Mr. Thomas, the counsel for the United States before the British-American Claim Commission, summed up the attitude of the United States when he wrote:[30]

> It is not true . . . that Texas is incorporated into and subjected to the dominion of the United States government, so as to destroy her responsibility for debts contracted while an independent republic, or her ability to meet them; but on the contrary, she is, for the purpose of fulfilling these obligations, as clearly responsible for their payment by the law of nations, by her separate and distinct organization, and by her solemn agreement with the United States, as she ever was, and is fully able to discharge them.

This statement must be modified in regard to the Texas obligations hypothecated on import duties. The United States held itself somewhat liable for this class of obligations and such liability was felt to rise, not from the merger but from the transfer of the imposts to federal hands.[31]

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[27] See note 8, of this chapter.

[28] H. Mis. Doc., No. 17, pp. 32, 40, 41, 33d Cong., 2d sess., and Auditors' Report, pp. 33-40.

[29] See above, note 22.

[30] Moore, Int. Arbs., IV, 3593, and Scott's Cases, p. 79.

[31] Lawrence's Wheaton, p. 54, note, cited in Moore's Dig. of Int. Law, I, 347, note.

The problems involved in the annexation of Hawaii were similar to those of Texas. During Hawaii's existence as an independent state, it had contracted a public debt of $4,603,747, as estimated by the Hawaiian Commission.[32] This consisted of a bonded debt totalling $3,689,700, created by various acts of the legislature, and $914,047 in obligations for deposits in the Hawaiian Postal Savings Bank. The legislature also had authorized a silver currency similar to that of the United States, and had issued silver certificates as legal tender redeemable in this currency.[33] Also, several claims against the Hawaiian government, arising from its acts when an independent republic,[34] still existed after its annexation.

When the United States absorbed the Hawaiian Republic, it was provided, in the joint resolution of July 7, 1898,[35] that:

> The public debt for the Republic of Hawaii lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing Government and present commercial relations of the Hawaiian Islands are continued, as hereinbefore provided, said Government shall continue to pay the interest on said debt.

The act of April 30, 1900,[36] for the establishment of a government of Hawaii, disposed of these obligations in the following manner:

The Secretary of the United States Treasury was to pay the depositors in the Hawaiian Postal Savings Bank; the silver certificates were to be redeemed by the Territory of

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[32] S. Doc. No. 16, pp. 88-89, 45th Cong., 3d sess. The Report of the Hawaiian Commission.

[33] Ibid., p. 90.

[34] Ibid., pp. 111-113. Claims arising from the imprisonment of aliens for activities in the insurrection of 1895; Japanese claim for damage for the prohibitory tariff on *sake*; Japanese claim for refusal to allow immigration; unallowed claim of Ladd & Co. for damages; claim of Hawaii on a bottomry bond for quarantine expenses; and all regular claims arising from 'assumpsit' and the like to be interruptedly prosecuted in the Hawaiian courts.

[35] H. J. Res. No. 55, 30 Stat. at L. 750.

[36] 31 Stat. L., 141, ch. 339; and S. Doc. 16, pp. 40-44, 55th Cong., 3d sess.

Hawaii by January 1, 1902, the United States to be in no way liable for the same; the silver coins were to be receivable as legal tender and remitted by the United States at face value; Hawaiian postage stamps were to be retired and exchanged for United States postage stamps; the revenues from the wharves were to go into the Hawaiian Treasury; and the proceeds of the sale of public lands, though going to the United States Treasury, were to be applied to public construction and services in the islands.

The theory on which this action was taken is given in an opinion of Attorney General Griggs.[37] He wrote:

> The general doctrine of international law founded upon obvious principles of justice is, that in cases of annexation of a state or cession of a territory, the substituted sovereignty assumes the debts and obligations of the absorbed state or territory—it takes the burdens with the benefits.

Mr. Griggs believed that there were only two exceptions to this rule, either express stipulation to the contrary in the treaty, or the absorption of contiguous territory by a highly centralized government wherein there exists no local autonomy:

> Where the federal idea obtains this is not so. It is only necessary to indicate by reference to our own scheme of government the notion of sovereign States and Responsible Territorial administrations making their own local laws through representative assemblies, entering into contracts, possession of separate revenues and treasuries, liable for their engagements and obligations, and exercising through the whole domain of local autonomy the powers of a distinct government. If there is a distinct and independent civilized government, potent and capable within its territorial limits, conducted by a separate executive, not acting as the mere representative by appointment of the distant central administration, I perceive no reason to doubt that such government rather than the central authority should respond out of its separate assets to any valid claims upon it, whether accruing from the past, presently accruing, or to accrue in the future. It does not matter what is the exact nature or extent of the connection between the principal state and the dependent possession, so long as the latter possesses its own organized government and is not a mere unorganized dependency.

In regard to the claims against the Hawaiian Government, he stated:

> A claim on foreign behalf against a State or Territory of the Union would be presented *through*, rather than to, the State Depart-

[37] XXII Ops. Atty. Gen. 585.

ment; that is, it would be presented to the local and not to the Federal Government and would be finally adjusted and recognized by the former, although the Federal Government is the international representative, and in various ways, short of coercion of a State admits a certain international liability. . . .[38] The dilemma by which, under the separate governmental entities, the Federal authority is not liable for the demand and the State authority has no international obligation, is apparent rather than real.[39]

A question might be raised whether this dilemma is apparent rather than real. There exists, as mute evidence to the contrary, the McCleod Case, the Webster Ashburton negotiations, the legal impediments which the states placed in the way of the collection of bona fide debts following the Revolution, and the action of Congress in regard to Texas. However, aside from this unfortunate phrase, Mr. Griggs' theory probably is the most clear, complete, and accurate official explanation of United States action which has been given.

The policy of the United States relative to the cases arising from the Spanish cessions bears out this theory. When the adjustment following the Spanish-American War of 1898 brought about the cession of Puerto Rico, the Philippines and other Spanish Islands to the United States, and the relinquishment of Spanish sovereignty over the Island of Cuba, a mass of public obligations were involved. These Spain sought to transfer to the United States *in toto*.[40] They consisted of the so-called Cuban debt, the Puerto Rican debts, the Philippine debts, and contractual obligations of an executory nature involving the continued payment of subsidies and guarantees.[41]

The transfer of these obligations, collectively and individually, was sought by Spain on several propositions. The Spanish Commissioners first advanced the thesis that the cession and relinquishment of sovereignty embrace the cession

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[38] Ibid., p. 587.
[39] Ibid., p. 586.
[40] S. Doc. No. 62, pp. 3-263, part 2, 55th Cong., 3d sess., Report of the proceedings of the Spanish and American Peace Commissions at Paris, 1898. See also, Moore, Dig. of Int. Law, I, 351-387 for extracts pertaining to the Cuban debt.
[41] Ibid., pp. 28-29, 45-53, 78-93, 100-105, 109, 218-221, 240-241.

and relinquishment of the rights and obligations constituting it.[42] They argued that the sovereign is under an obligation to secure the prosperity and progress of his subjects; that this requires the collection and application of public revenues to the public welfare, which in turn, necessitates contracting obligations for carrying out this purpose:

> These obligations exist from the moment they are contracted until they are fulfilled. And it is perfectly self-evident that if, during the period intervening between the assumption by a sovereign of an obligation and the fulfillment of the same, he shall cease to be bound thereby through relinquishment, or any lawful conveyance, the outstanding obligations pass as an integral part of the sovereignty itself to him who succeeds him.[43]

The American Commissioners denied that the rights and obligations of a sovereign were an integral part of his sovereignty. They pointed out that:

> National sovereignty, as defined by high Spanish authority, is 'the right which a nation has of organizing the public powers in such a way as it may deem advisable.' This right, though it includes the powers to contract obligations, is in no sense composed of them. The thing done in the exercise of sovereignty is not a part of the sovereignty itself; the power to create is not the thing created.

Moreover, they contended that in using the term obligations the Spanish negotiators confused two different things: the duties which a sovereign as such owes to his subjects; and the debts which he may specially contract in the exercise of his sovereign power for his own purposes.[44] The American Commission was willing to assume the first group of obligations.[45] But in regard to the second group it did not deny that the debts contracted by the sovereign might transfer in some cases. It merely remained silent upon the question.[46]

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[42] S. Doc. No. 62, p. 41; also see pp. 28, 41, 48, 78, 87, 98, 218, 221.
[43] Ibid., pp. 41-42.
[44] Ibid., pp. 48, 50, 53, 59, 41, 30.
[45] Ibid., pp. 53, 59, 98, 240. Gabbon v. U. S., 40 Ct. Cl. 405, 207 U. S. 579, held that the obligations assumed by the United States in Cuba were limited by the treaty of Paris, 1898, Art. 16, to the time of occupation. During occupation the United States assumed the obligations resulting therefrom under international law. These obligations consisted of protecting the life, liberty, and property of the inhabitants.
[46] Ibid., pp. 48, 50, 53, 58, 59, 97.

Spain's representatives then declared: [47]

It is not the purpose here to transfer, together with the sovereignty over Cuba and Puerto Rico, a proportional part of the obligations and general charges of the mother country, but only the obligations and charges attaching individually to the islands ceded and transferred. . . . It may be considered as an absolutely essential condition that the cession of a ceded territory carries with it the cession of the departmental, communal, and generally speaking, individual obligations and debts of ceded territory.

The Spanish Commission held that such debts included: [48]

All outstanding obligations that have been legally contracted for the service of Cuba and Puerto Rico, and which are chargeable to their individual treasuries, always distinct and separate from the Treasury of the Peninsula, are Cuban or Puerto Rican obligations, that is, local obligations, solely and exclusively affecting the territory of the islands and their inhabitants.

This statement contained the doctrine that local obligations transfer with the territory, a doctrine followed by the United States in the cases of Texas and Hawaii.[49] However, it also assumed, first, that the obligations under consideration were local debts, and second, that the sovereign had the power and right to hypothecate and fix upon a locality any obligations which it sees fit.

The United States repudiated the right of a sovereign to hypothecate in perpetuity a debt on a province. Much time was taken by the American Commissioners in showing that the debts under discussion were contracted against the will of the Cubans, in the name of Spain and for the purpose of putting down the Cuban insurrections and carrying on the war against the United States.[50] They declared: [51]

From the moral point of view, the proposal to impose them upon Cuba is equally untenable. If, as is sometimes asserted, the struggles for Cuban independence have been carried on and supported by a minority of the people of the island, to impose upon the inhabitants as a whole the cost of suppressing the insurrections would be to punish the many for the deeds of the few. If, on the other hand, those struggles have, as the American Commissioners maintain, represented the hopes and aspirations of the body of the Cuban people, to crush the inhabitants by a burden created by Spain in the effort to oppose their independence, would be even more than unjust.

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[47] Ibid., p. 42.
[48] Ibid., p. 43.
[49] See above, pp. 82-94, in this chapter.
[50] S. Doc. No. 62, pp. 49-53, 97-105, 55th Cong., 3d sess.
[51] Ibid., p. 50.

In regard to the assumption that the Cuban debt was a local obligation, they wrote:

> The American Commissioners were able to show that the debt was contracted by Spain for national purposes, which in some cases were alien, and in others actually adverse to the interest of Cuba; that in reality the greater part of it was contracted for the purpose of supporting a Spanish army in Cuba, and, that, while the interest on it has been collected from the revenues of Cuba, the bonds bear upon their face, even where those revenues were pledged for their payment, the guarantee of the Spanish nation. As a national debt of Spain, the American Commissioners have never questioned its validity. . . .[52] From no point of view can the debts above described (the so-called Cuban debt) be considered as local debts of Cuba, or as debts incurred for the benefit of Cuba. In no sense are they obligations properly chargeable to the island. . . . They are debts created by the Government of Spain, for its own purposes, and through its own agents, in whose creation Cuba had no voice.[53]
>
> The American Commissioners deem it unnecessary, after what has been stated, to enter into an examination of the general references made in the Spanish memorandum, to cases in which debts contracted by a state have, upon its absorption, been assumed by the absorbing state, or to cases in which, upon the partition of territory, debts contracted by the whole have been by special arrangement apportioned. They are conceived to be inapplicable, legally and morally, to the so-called 'Cuban debt,' the burden of which, imposed upon the people of Cuba without their consent and by force of arms, was one of the principal wrongs for the termination of which the struggles for Cuban independence was undertaken.[54]

This doctrine was not discussed by the American Commissioners for three reasons: it was not applicable to the alleged Cuban debt; there was no Puerto Rican debt;[55] and the provisions of the Protocol for Peace providing for the cession and relinquishment of the territories excluded the question of the assumption of the debts and obligations of the territories from discussion.[56] Had the American Commissioners felt that the converse of this principle, that is, that local debts and obligations do not pass with the transfer to the new sovereign, was the established practice and policy of the United States and the rule of nations, they would

[52] Ibid., p. 104. [53] Ibid., p. 50. [54] Ibid., p. 50.

[55] Ibid., p. 103, "No Porto Rican loan was even contracted or floated before 1896. No Porto Rican bonds are quoted in the markets of Europe or America." Citing also the report of Señor Castellano, the colonial minister of Spain, of June 30, 1896, "'It, [Porto Rico] being without public debt'," and other Spanish official documents to the same effect.

[56] Ibid., pp. 48, 59, 97.

undoubtedly have used it as an argument in this case. In no other way can one explain the care and length to which the Commissioners went to show that, in the case under consideration, the rule was inapplicable.

The Treaty of 1898 resulting from the negotiations ceded and relinquished the sovereignty of Spain without specifying that the United States should assume any of the public debts of Spain.[57] This formed the basis for the refusal of the military governor of Cuba to pay claims that arose prior to January 1, 1899, except in that part of Cuba surrendered to the United States forces July 17, 1898.[58] It is further indicated by the action of the Spanish government in assuming the payment of pensions to peninsulars and natives of Cuba under certain conditions, who were entitled to such remuneration.[59]

According to Protocol 11: "The American Commission beg further to state that they are prepared to insert in the treaty a stipulation for the assumption by the United States of any existing indebtedness of Spain incurred for public works and improvements of a specific character in the Philippine Islands." [60] And in a communication from Commissioner Day to Commissioner Rios, the former declared, "But in respect of the Philippines the American Commissioners . . . will agree that their Government shall pay to Spain the sum of $20,000,000." [61] The latter provision was incorporated in the treaty of peace.[62]

On the other hand, an article was proposed which read:

> Contracts formally entered into by the Spanish Government or its authorities for the public service of the Islands of Cuba, and Porto Rico, the Philippines and others ceded by this treaty, and

[57] Malloy's Treaties, Treaty of Paris of 1898, II, 1690.

[58] Moore, Dig. of Int. Law, I, 385, note (Hay to Duke of Arcos, Aug. 3, 1900, MS. Note to Spain, II, 512; Hill to Duke of Arcos, Sept. 20, 1900, ibid., II, 521).

[59] The Royal Decree of May 11, 1901, and Premier Sagasta's Report of the same date. For. Rel. 1901, p. 475. See more fully in Chapter on Nationality, supra. Also cited in Moore, Dig. of Int. Law, I, 381.

[60] S. Doc. No. 62, p. 109, 55th Cong., 3d sess.

[61] Ibid., p. 218, Annex 2 to Protocol 16, and p. 232, Annex to Protocol 19, Art. III.

[62] Art. III, of Treaty of Peace of 1898, ibid., p. 5.

which contracts are still unperformed, shall continue in force until their expiration pursuant to the terms thereof. Such contracts as also cover the service peculiar to Spain or any of her colonies, the new Government of the above-mentioned islands shall not be called upon to carry out, save only in so far as the terms of said contracts relate to the particular service or treasury of such islands. The new Government will, therefore, as regards the said contracts, be holden to all rights and obligations therein attaching to the Spanish Government.

The President of the American Commission stated that: [63]

The American Commissioners are constrained to reject these articles. The United States did not propose to repudiate any contract found upon investigation to be binding under International Law; and it might be assumed that the United States would deal justly and equitably in respect of contracts that were binding under the principles of International Law.

The Philippine debt was handled separately in the negotiations. A perusal of the notes exchanged confirms the statement of Law Officer Magoon that the amount of $20,000,000 was paid by the United States and accepted by Spain in lieu of a transfer of obligations.[64] The Hon. Whitelaw Reid, one of the American Commissioners, writing of the action of the commission on this problem, said: [65]

Not 'til they learned that of this entire 'Philippine debt' (only issued in 1897) over one fourth had actually been transferred to Cuba to carry on the war against Cuban insurgents, and finally against the United States, and that the most of the balance had probably been used in prosecuting the war in Luzon, did the American Commissioners abandon the idea of assuming it. Even then, they resolved, in the final transfer, to fix an amount at least equal to the face value of that debt, which should be given to Spain as an acknowledgment for any public improvements she may have made there, not paid for by the revenue of the islands themselves. She could use it to pay the Philippine bonds if she chose. That was the American view as to the sanctity of a public debt legitimately incurred in behalf of ceded territory; and that is an explanation of the money payment in the case of the Philippines, as well as of the precise amount at which it was finally fixed.

In carrying out the treaty of 1898, several cases arose which hinged upon the theory and practice of the United States in regard to the transfer of the public financial obligations of the

[63] Ibid., pp. 240-241.
[64] Magoon, p. 182.
[65] Whitelaw Reid in Anglo-Saxon Review of June, 1899, cited in Magoon, p. 187.

ceding state to the successor.[66] One of the most enlightening of these cases was that of the Manila Railway Company, which involved an executory contract and subsidy granted by Spain.[67]

The Manila Railway Company was a British corporation to which the Spanish Government had granted a concession to build and operate a railroad from Manila to Dagupan. The corporation rendered such various services to the government as the transportation of mails, the erection of telegraph lines for state use, and preferential tariffs for civil and military uses of the railway. In return, the Spanish government guaranteed the company a return of eight per cent per annum on the invested capital, the latter being finally determined as approximately five million dollars. The Royal Decree granting the concession provided that the Government reserve the right to recoup itself for such expenditures necessitated by the guarantee, to the extent of two-thirds from the local funds belonging to the provinces which the aforesaid line crosses, in accordance with the practice established for other public works in the Philippine Islands. This guarantee was to be paid from the treasury of the Philippines, although one-third ultimately was to come from the Spanish Treasury of the Peninsula. The contract was for eighty-seven years, and in some respects remained executory for that time.[68]

It must be noted that from a military standpoint the railway was fitted for the defense of the Islands from an enemy on the east, whereas American military needs demanded protection from the west.

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[66] In this chapter are included only the Manila Railway Co. Cases and the Eastern Extension of the Australasia and China Tel. & Tel. Co. Cases. These had to do with the financial public obligations of the former state and were regarded as personal executory contracts of the Spanish government. However, a group of cases involving franchises, monopolies, cable rights, and the like, which did not call for governmental monetary subsidies or guarantees, were discussed in the preceding chapter placed there because of their similarity to municipal contracts, and their involving of conditional proprietary rights, much as in conditional land grants.

[67] This case is reported in Moore, Dig. of Int. Law, I, 395-406; Magoon, pp. 177-193; and XXIII Ops. Atty. Gen. 181 ff.

[68] Facts and documents cited in Magoon and XXIII Ops. Atty. Gen.

In Protocol 20 of the peace negotiations, the Spanish Commissioners proposed that the United States should assume all public contracts, specifically mentioning the Manila-Dagupan Railway concession. The American Commissioners rejected the plan, yet stated that the United States would not repudiate any contract binding under international law.[69] It was under the authority of this protocol that the Company presented a claim to the United States for the payment of the guaranteed interest accruing after the date of the Treaty of Peace.

Law Officer Magoon, in reporting on the liability of the United States under international law for this obligation, pointed out that, in the opinion of the American Peace Commission,[70] and the Manila Railroad Company,[71] the contract was a "general debt" or "personal contract" of the Spanish Government,[72] and was recognized by the Spanish Government as an obligation of the National Government of Spain which still belonged to it.[73] He indicated further that the obligation was a "personal contract," of a political subdivision.[74]

Mr. Magoon declared:

> Liability for debt arising upon personal obligation of the general government does not pass with the ceded territory unless stipulated for in the Treaty of cession. . . .[75]
>
> It is the power, the authority, that passes with the ceded territory from one sovereignty to another, and it is the obligations or duties which a sovereignty owes to its subjects regarding the use of such power which passes, not the debts which the prior sovereignty has contracted for its own purposes by the exercise of that power. However, if the sovereignty has lawfully pledged any portion of the territory ceded for the payment of the debt or the performance of a contract, and the benefitted party has a property interest or vested right therein, such right is to be protected by the new sovereignty. But no such claim is made herein by the railroad company.

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[69] S. Doc. No. 62, pp. 240, 55th Cong., 3d sess.

[70] Magoon, p. 184, citing S. Doc. No. 62, pp. 48-50, 55th Cong., 3d sess., part 3.

[71] Ibid., pp. 184, 195, citing letter of F. W. Whitridge of Nov. 27, 1899, S. Doc. No. 7, p. 849.

[72] Ibid., pp. 180, 182, 184; quotes from p. 184.

[73] Ibid., pp. 185-186, citing official publication of the proposal of the Spanish minister of finance for a reorganization of the Spanish debts, and the decree of a Spanish court in Madrid.

[74] Ibid., pp. 186, 180. The Philippine Islands were not autonomous under Spanish rule.

[75] Ibid., p. 182.

Debts which are not secured by lawful liens upon the territory ceded, even though contracted for the benefit of said territory, do not become a debt of the new sovereignty. In other words, no *legal* obligation exists requiring the discharge of the grantor's debts by the grantee in the absence of treaty stipulations to do so.

The obligation under such conditions arises in equity, if at all, and is based upon the established rule of national conduct, that the sovereign will not do injustice to an individual, and therefore will hear and consider the claims of the creditors. Therefore, it is said that such debts are a charge upon the conscience of the sovereign.[76]

In this case, Mr. Magoon held that:[77] the guarantee did not become a charge upon the revenues of Luzon; the contract did not burden the revenues of the Philippine Islands with a trust in favor of the company; and, therefore, inasmuch as the treaty did not provide for its assumption, and inasmuch as Spain had recognized its nature and received payment from the United States, the Manila Railway contract was not binding on the conscience of America. He further held that, should the contract be binding, it was wholly for Congress to decide to what extent the contract would be executed.

On the other hand, Attorney General Griggs dealt with the problem arising from this case from the standpoint of the benefits received under the contract. However, at first his reasoning followed that of Mr. Magoon:

The contract was made by Spain and the party for her own benefit. It was the indivisible personal contract of Spain and of the concessionaire. . . .[78]

Spain is regarded by the law of nations as having a distinct personality of her own, distinct from that of the power which has succeeded her in control of the ceded territory, and I am not aware of any authority for saying that such personal obligations, either on the part of the Government of Spain or the other contracting parties, become binding as contractual obligations upon a government which made no such promises, or upon the individual toward a government to which he made no such promises. . . .[79] A man cannot be bound by a stranger's promises.[80]

Then the Attorney General introduced a different approach to the problem:

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[76] Ibid., pp. 189-190. (Italics are author's.)
[77] Ibid., pp. 182, 183, 185, 186, 191, 192, 193.
[78] XXIII Ops. Atty. Gen., p. 186.
[79] Ibid., p. 188.
[80] Ibid., p. 187.

But benefits may be received by a province as well in the pursuance of a personal contract of the sovereign party for his own benefit as otherwise. They are none the less benefits received and retained by the province, and if the burden of the contract itself does not go with them, the burdens of the obligation to do equity toward the contractor who has supplied them does go with them. . . .[81]

A debt or executory contract by a city or province, whether made by its people or by imperial authorities over it, for gas or irrigation works of other local works, including railroads of only local use, presents another question altogether. He who contends that the liability in such a case is destroyed by a mere change of sovereignty over the city or province, has clearly an unjust cause to maintain.[82] Although the contract has departed from Spain, there is a general equitable obligation upon the provinces to make some fair arrangement with the company as to the two-thirds benefit, and they cannot justly take advantage of the disappearance of Spain to retain what she procured for them, on the credit of their funds, and deny all liability for the price. Whether, based exclusively upon the reception (for the future, and as far as geographical, political, and other differences will permit a benefit to continue) of the benefit of the railroad, the United States has incurred any liability affecting one-third of any portion of the original indebtedness, it is unnecessary to consider since, if so, it will be for Congress to deal with it.[83]

The Company and the government of the Philippine Islands finally settled the case by dealing with it not as a legal problem, but as a business proposition.[84] The concessions granted the Manila Railway Company were extended from time to time and new ones were granted by the Philippine Commission.[85]

The case of the Eastern Extension Australasia and China Telegraph Company was similar. This company had secured a concession to construct and operate certain telegraph and cable lines in and from the Philippines. In return for an annual tax payment, and special privileges, the Spanish Government paid them an annual subsidy of 4,500 pounds.[86] Mr. Magoon was of the opinion that this contract also was unprotected by the Treaty of Paris, and the company had no legal claim

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[81] Ibid., p. 187. [82] Ibid., p. 189. [83] Ibid., pp. 190-191.
[84] Moore, Dig. of Int. Law, I, 406.
[85] See Report of the Philippine Commission.
[86] Moore, Dig. of Int. Law, I, 406-410; Pauncefote to Hay, Oct. 10, 1898, MSS. Notes from British Legation; Pauncefote to Hay, Jan. 18, 1899, ibid.; Pauncefote to Hay, Feb. 1899, ibid.; Hay to Pauncefote, Jan. 19, 1899, MSS. Notes to Brit. Leg. XXIV, p. 424.

against the United States in international law.[87] Attorneys General Griggs and Knox held that the agreement was a personal contract with Spain, and no identical contract with the United States had been created by the cession of the sovereignty of the Philippines. However, they felt there existed an equitable obligation on the localities benefited to pay the contractors for the local benefits derived from the contract.[88] When the case was taken to the United States courts, the claim was not based on the rights of the company under international law, but on an implied contract arising from reception of the preferential treatment and the special tax accorded the government by the provisions of the contract.[89] Consequently, a good opportunity for a decision squarely on the point of international law was lost.

In order to protect the interests of its citizens in foreign countries when the latter have undergone territorial changes, it has been necessary for the United States to take a position relative to the transfer of public financial obligations.

During the territorial reorganizations occasioned by the Napoleonic wars, two instances arose which touched upon this question. The Netherlands underwent a series of changes of status, and the Kingdom of Naples for a period was placed under the rule of Murat. Claims of United States citizens against these countries arose out of the confiscations and treatment of ships and goods because of the war measures adopted at the time.[90] These claims were presented by the United States to the two countries successively during the wars, following the adjustment of national boundaries, and also after the reinstatement of independent government. This was done on the proposition that nations are liable for acts committed in their territory no matter what changes they have undergone.

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[87] Magoon, pp. 529, 541.

[88] XXII Ops. Atty. Gen. 384; XXIII, ibid., pp. 195 and 451.

[89] Eastern Extension Australasia and China Telegraph Co. v. U. S., 231 U. S. 326. Also see opinion of Justice Hughes.

[90] For the Netherlands Correspondence see For. Rel., V, 603 ff, and Moore, Int. Arb., V, 4473-4476. For the Neapolitan Indemnity see Moore, Int. Arb., V, 4575-4587.

In the negotiations with the Netherlands, Mr. Adams made his often quoted and misquoted statement: [91]

> The conqueror who reduces a nation to his subjection receives it subject to all its engagements and duties toward others, the fulfillment of which then becomes his own duty. However frequent the instances of departure from this principle may be in point of fact, it cannot with any color of reason be contested on the ground of right.

Although this was said primarily in connection with treaty obligations,[92] it was used as the basis for the diplomatic representations subsequently sent to the Netherlands on behalf of the claims of American citizens. This is shown by the dispatch of Mr. Eustis: [93]

> The rights of the claimants whose property has been antecedently seized, ought not, it is contested, to be affected by an act over which they had no control. . . . The annexation of Holland to France cannot be construed to affect the claims.

When prosecuting the claims against Naples, the question arose whether that state had been subject to governmental change or a state succession. The United States took the position that no matter which it was, Naples was to be held liable for damages done to American commerce through the orders and official acts of Murat, whether he was an independent king of Naples, or a dependent instrument of the Emperor of France.[94] The United States was successful in this contention, and received indemnity from the Kingdom of Naples for the losses of its citizens.[95]

When the Spanish colonies in South America won their independence from Spain, they assumed a proportionate part of the public financial obligations.[96] Also, when, in turn, the colonies themselves split into separate sovereign entities, they followed the same policy. Therefore, when Colombia dis-

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[91] Adams to Everett, Aug. 10, Am. Stat. Pap., For. Rel., V, 603.

[92] See chapter on Treaties.

[93] Eustis to Baron de Nagel, Feb. 22, 1827, Am. Stat. Pap., For. Rel., V, 603.

[94] Am. Stat. Pap., For. Rel., IV, 160-169, and see Moore, Int. Arb., V, 4575-4587, for further documents.

[95] S. Doc. No. 351, 25th Cong., 2d sess., cited in Moore, Int. Arb., p. 4581 note.

[96] S. Doc. No. 62, p. 43, 55th Cong., 3d sess., part 2.

integrated and became New Granada, Ecuador, and Venezuela, the United States contracted various conventions with these new states for the presentation and proportionate settlement of American claims against Colombia for bonds, stocks, coupons, and damages.[97] The presentation of these claims took on the character of official acts when, as in the case of the "Mechanic," they were put forward by the United States ministers.[98]

Brazil, a short while later, underwent a separation from Portugal, and immediately the United States negotiated the convention of 1849 for the settlement of claims against the former state arising from its acts prior to that date.[99] Mr. Fischer, the United States Commissioner, made many awards out of the lump sum provided by Brazil for the settlement of such claims.[100] He said, in the case of the "Tarquin," a ship which had saved a transport of the King of Portugal, Brazil and Algarves, incurring a loss thereby for which compensation was promised:[101]

> The question then presents itself whether, on the separation of the two countries which subsequently took place, this claim, still remaining unliquidated, became extinguished altogether by their separation, or was transferred in whole or in part to Portugal from Brazil, . . . or whether Brazil alone should be held to the entire liability of the claim. . . . This claim was in the nature of a public debt, founded upon the King's decree, and by the rule of international law public debts are not extinguished upon the division of a state into distinct states, whether that division be by war or mutual consent; but they must be discharged either jointly or severally according to the principles of justice and equity. And as to Brazil accrued the entire benefit of the service rendered by the 'Tarquin,' as in her royal magazines there remained for her benefit the oil with which that service should have been requited and paid, in obedience to the order of the King, so also upon every ground of equity and right should the entire responsibility for this claim have passed to her upon her separation from Brazil.

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[97] Treaty with Ecuador of Nov. 25, 1862, Malloy's Treaties, I, 432; Treaty with Venezuela, of May 1, 1852, ibid., II, 1842; Treaty with New Granada of Sept. 10, 1857, ibid., I, 319; Colombian Bonds, Moore, Int. Arb., IV, 3612-3616; Venezuelan Claims Commission, ibid., III, 3223-3227.

[98] See Moore, Int. Arb., III, 3220 ff.; also discussion below, pp. 131-132.

[99] Malloy's Treaties, I, 144.

[100] Moore, Int. Arb., V, 4609-4626, citing documents.

[101] Ibid., pp. 4618-4619.

A war arose between Chile and Peru in 1882, and Chile was successful in conquering and annexing a portion of Peruvian territory. On the rich guano deposits of this land some of the Peruvian bonds were hypothecated.[102] It was the opinion of the United States that Peru should not sign any convention with Chile which might injure the rights of the creditors of Peru who held a lien on the nitrate and guano deposits of the territory.[103] Mr. Freylinghuysen added that:[104]

> If Chile appropriates the natural resources of Peru as a compensation for the expenses of the war, she should recognize the obligations which rest upon those resources, and take the property with a fair determination to meet all the just incumbrances which rest upon it.

The opinion was upheld in the correspondence of the State Department relative to the subject.[105]

It would appear from the foregoing cases, theories, and opinions, that the United States has been vitally interested in the disposition of public financial obligations on a transfer of sovereignty. The practice shows that no unqualified statement concerning the assumption of public debts can be adequate, yet this does not mean that no systematic policy has been adopted by the United States.

It is evident that public obligations may be divided into several categories. There are obligations secured by hypothecation, and there are debts that are unsecured. These obligations may be those of a national government or of a local government. They may take the form of bonds, stocks, treasury certificates, treasury notes, or claims for wages, pensions, purchases, or damages. They may be executed or executory contracts, of a "personal" or local character. They may be contracted for national or local purposes, either of which may be of a beneficial nature to either the nation

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[102] Ibid., V, 4863-4864; Moore, Dig. of Int. Law, I, 335-336; For. Rel. of 1888, I, 182 ff; ibid., 1883, p. 708.

[103] For. Rel., 1883, p. 708, no. 444, Freylinghuysen to Partridge, Feb. 1, 1883.

[104] Ibid., no. 446, Freylinghuysen to Phelps, Aug. 25, 1883.

[105] See note 103 for references.

or the locality. Public debts may involve a relationship between states, between a local government and the state, between individual legal persons and the state, or between legal persons and the local government. All these factors enter into the disposition of the public financial obligations of the ceding states.

One tendency stands out. There is no *legal* obligation on the part of successor to assume the public financial obligations of his predecessor, unless such assumption is expressly provided for in the treaty of cession. What is meant by the use of the term "legal" is not easy to determine. It may be that "legal" means "must" under our own law, as distinct from either the "must" of international law, or the "ought" of equity.

However, it has been generally felt that the United States, as a great and just nation, ought to do "equity" to public creditors. It is from this practice of seeking what is equitable in the various cases and acting accordingly that the policy of the United States in regard to the assumption or disposition of various classes of public financial obligations may be determined.

In the first place, the United States has refused to recognize the general doctrine that all public debts transfer with the sovereignty, for two apparent reasons: the acceptance of the fundamental principle that one man cannot be bound by another man's promises; the denial of the power of a sovereign to hypothecate a debt upon a locality in perpetuity. In the second place, the United States has taken the position that the sovereign power is distinct from the obligations created by the exercise of that power, and that the new sovereign is an altogether distinct person from the old sovereign. In the third place, the adoption of the principle that public obligations of a financial nature pass with the territory has been considered dangerous in the light of the practical results which such a policy might engender.

On the other hand, the United States has felt that it must deal equitably with public obligations because it is unjust to receive the benefits of a contract without assuming the

obligation to compensate the contractors; because it is inequitable for a debtor to dispose of the securities upon which creditors lend their credit; and because it is a general rule of common law that a lien follows the land.

Therefore, when public financial obligations are contracted by the national government of the ceding state for national purposes, the policy of the United States concerning the assumption of such debts has been varied. In case such obligations were contracted for purposes hostile or not beneficial to the interests of the territory transferred, the United States has not assumed them no matter whether they were formally hypothecated on the resources of the territory or not. In case such obligations were contracted for purposes beneficial to the interests of the territory transferred, the United States has assumed them directly or indirectly, whether they were formally hypothecated on the resources of the acquired territory or not. In the latter case the obligations have been assumed to the extent of the benefits received, and the obligation of compensating the contractor has been placed on those benefiting by the contract, usually the local inhabitants, or governmental unit. Therefore, when a state has been entirely absorbed by the United States, it has been assumed that all of its public debts benefited the acquired territory. Consequently, the acquired locality has been charged with liquidating those obligations in proportion to the resources it still retains. Debts of a provincial or local nature contracted by a local government for local purposes, usually have been charged to that locality when it has been ceded to the United States.

CHAPTER VI

Effect on Treaties

Unfortunately the effect of state successions on treaties as evidenced by the practice of the United States is not easy to determine. The cases in which official opinions bearing on the subject have been expressed have been complicated by problems relating to the change of the circumstances upon which the treaty was based and the ability of the successor to perform the treaty provisions. The two factors may occur either when there is or when there is not a change of sovereignty, and often throughout the history of the United States the termination of treaties has depended upon them. A principle based on the occurrence of a change of sovereignty alone is only one of several that may determine the disposition of treaties following state successions.

This difficulty is illustrated in the controversy which arose between the United States and the Netherlands concerning the treaty of peace and commerce of 1782.[1] It was in connection with the question of the termination of this treaty that Adams as Secretary of State wrote the often quoted statement:[2]

> No principle of international law can be more clearly established than this: That the rights and obligations of a nation, in regard to other states, are independent of its internal revolutions of government. It extends even to the case of conquest. The conqueror who reduces a nation to his subjection receives it subject to all its engagements and duties towards others, the fulfillment of which then becomes his own duty. However frequent the instances of departure from this principle may be in point of fact, it cannot with any color of reason be contested on the ground of right. On what other ground is it, indeed, that both the governments of the Netherlands and the United States now admit that they are still reciprocally bound by the engagements and entitled to claim from each other the benefits of the treaty between the United States and the United Provinces of 1782. If the nations are respectively bound to the stipulations of that treaty now, they were equally bound to them in 1810, when the depredations, for which indemnity is now claimed, were committed;

[1] Malloy's Treaties, II, 1253.

[2] Am. State Pap., For. Rel., V, 603, No. 7, Adams to Everett, Aug. 10, 1816.

and when the present King of the Netherlands came to the sovereignty of the country he assumed with it the obligation of repairing the injustices against other nations which had been committed by his predecessors, however free from all participation in them he had been himself.

Mr. Everett wrote to Baron de Nazel,

On this principle the treaty concluded in 1782 between the United States of America and the United Provinces of the Netherlands is admitted by the American Government, and it is presumed by that of His Majesty to be still in force.[3]

It would appear from these quotations that the United States subscribed to the doctrine that changes of sovereignty do not affect treaty obligations. Indeed, during a subsequent controversy, Mr. Westenberg of the Netherlands cited this correspondence as evidence of the adoption of the doctrine by the United States.[4] However, the history of the case does not bear out the conclusion that such a principle was actually accepted.

After 1782 the Netherlands underwent several changes: they became the Republic of the United Provinces by means of a revolution; this was followed by a Bonaparte Monarchy; later, the nation was incorporated into the French Empire as a constituent part thereof; and finally, at the general settlements of peace at Paris, and at Vienna, it was reconstituted as an independent state comprising much more territory than originally. When the new state opened diplomatic relations with the United States, it was proposed that a treaty of amity and commerce be concluded if the old treaty was abrogated by these state changes. Mr. Monroe, then Secretary of State, felt that the treaty of 1782 had not survived the changes of sovereignty and could be put in force solely by a new exchange of ratifications.[5] Later, when Mr. Adams became the Secretary of State, the question arose as to the liability of the Netherlands for indemnification to American

[3] Am. State Pap., For. Rel., V, 603, No. 8, Everett to de Nazel, Feb. 22, 1817.

[4] For. Rel. 1873, part 2, notes 312, 314, 315, pp. 712, 715-720, Westenberg to Fish.

[5] Ibid., pp. 720-727, No. 316, Fish to Westenberg, Apr. 9, 1872; Davis' Treaty Notes, p. 1235; Moore, Dig. of Int Law, V, 344-345.

commerce for depredations to American property during the Napoleonic wars. At that time the stand was taken that the treaty rights given by the treaty of 1782 to Americans still existed and the liability for any infringement of them fell on the Netherlands government. However, as was intimated by Mr. Fish in reviewing the case, this stand was taken in order to insure that innocent third parties should not be damaged by acts with which they had nothing to do, rather than solely on the basis of any doctrine of succession to treaty obligations.[6]

It will be noticed that the arguments of Adams and Everett proceeded from the principle of governmental responsibility following a governmental change, rather than from the doctrine of state liability attendant upon a state succession. However, the germ of the latter doctrine may have existed in the arguments.[7] As a matter of fact, these claims against the Napoleonic regime were finally presented to France and settled under the Treaty of 1831 as French liabilities.[8]

Following this controversy, some years later, the Dutch claimed special commercial privileges for the New York-Rotterdam Steamship Company under the Treaty of 1782. The United States immediately replied that the treaty had long since been terminated and that it was so recognized by the two governments who had subsequently regulated their commercial relations by reciprocal legislation. The basis for claiming the treaty to be non-existent was not that treaties of a commercial nature do not survive a state change, but that both governments had recognized that this treaty was abrogated because of a material change in circumstances.[9]

The problem of the continuation of treaties arose in regard to the various treaties of amity, commerce, naturalization, and extradition which were concluded with the German states prior to their absorption by Prussia in the gradual uni-

[6] See note 5 below.
[7] See quotations above.
[8] For. Rel. 1873, pt. 2, pp. 720-727, and Malloy's Treaties, I, 523.
[9] For. Rel. 1873, pp. 712-727, Notes 312, 316, and references in above, note 5.

fication of the German Empire.[10] These state changes may be divided into two classes: cases of complete absorption; cases of federation.

Of the first class Davis wrote that where a state lost its separate existence, as in the case of Hanover and Nassau, no questions as to the termination of the treaties of the absorbed state could arise.[11] In regard to such state changes, the court declared in Terlinden versus Ames:[12]

> Undoubtedly treaties may be terminated by the absorption of powers into other nationalities, and the loss of separate existence, as in the case of Hanover and Nassau which became, by consent, incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of the treaties impossible.

However, in regard to the second class of state successions, the court held:[13]

> . . . where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties cannot be regarded as voided because of impossibility of performance. . . . Admitting that the Constitution created a composite state instead of a system of confederated states, and even that it was called a confederated Empire rather to save the 'amour propre' of some of its component parts than otherwise, it does not necessarily follow that the Kingdom of Prussia lost its identity as such, or that treaties theretofore entered into by it could not be performed either in the name of its King or that of the Emperor. We do not find in the Constitution any provision which in itself operated to abrogate existing treaties or to effect the status of the Kingdom of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obligations have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed.

This dictum also applied to the treaties of amity, com-

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[10] Cf. Malloy's Treaties, I, 550.

[11] Davis' Treaty Notes, p. 1234; 184 U. S. 270; Moore, Dig. of Int. Law, V, 355; Hill to Hitt, Dec. 20, 1900, 249 Dom. Let. 584.

[12] Terlinden v. Ames, 184 U. S. 270.

[13] Ibid. Also Moore, Report on Extradition, pp. 93, 94, and Laband, Das Staatsrecht des Deutschen Reichs, pp. 122-124, 142; In re Beck, 11 N. Y. S. 199; Stamm v. Bostwick, 40 Hun. 35 (N. Y.), Treaty of 1799 as modified by other conventions continued in force until abrogated by the Treaty of Aug. 25, 1921; Junkers v. the Chemical Foundation, 287 F. 597.

Treaty of 1828 with Prussia in regard to deserters applied to deserters of the North German Union, Evarts, 1868, XII Ops. Atty. Gen. 463. See also 50th Cong. Rec., pt. 6, p. 5346, 63d Cong., 1st sess.

merce, and navigation of 1827 with the Free Hanseatic Cities of Lubeck, Bremen and Hamburg:[14]

> Until the commencement of the [World] war with Germany, the treaties were clearly in force. Treaties with sovereign states, which became constituent parts of the German Empire, survived the formation of the Empire. . . . Upon this assumption the government refrained from entering into new commercial conventions.

From time to time the United States courts have held that the various extradition, naturalization, and commercial treaties of Bavaria,[15] Wurtemberg,[16] and other German States[17] were unaffected by the consolidation of the German Empire. This declaration was made by the courts because the political departments of the American government had recognized the continuance of the conventions.

The blanket statement was made in the "Sophie Rickmers" case, that treaties were consensual in their nature, and the obligations of its predecessor were deemed to be accepted by the successor state. However, this broad doctrine evidently was not the basis for the decisions pertaining to the German treaties. In those cases the courts based their decisions on the ability of the state undergoing a change of sovereignty to perform the obligations of the treaties in question.

The determination of the ability of a nation to perform the obligations of a treaty was held to be a political question. Thus, the courts followed the decisions of the political de-

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[14] The Sophie Rickmers, 45 F.(2d) 413; also Schultze v. Schultze, 11 N. Y. 201, holding Treaty of 1827 with Bremen in force; Disconto Gesellschaft v. Umbreit, 208 U. S. 570; Goos v. Brocks, 223 N. W. 13; U. S. v. Diekelman, 92 U. S. 520; and 50th Cong. Rec., pt. 6, p. 5345, 63d Cong., 1st sess.

[15] Ex parte Thomas, 12 Blatch 370; Ex parte Zentner, 188 F. 344; Terlinden v. Ames, 184 U. S. 170; also Fish to Bancroft, For. Rel. 1873, I, 279.

[16] In re Strobel's Estate, 39 N. Y. S. 169, Treaty of 1844 with Wurtemberg in force until abrogated by treaty of 1871; Weiland v. Penner, 65 How. Proc. 245; Kull v. Kull, 37 Hun. 476.

[17] See generally For. Rel. 1873, I, 279-281; ibid., 1885, pp. 404, 443, 444; ibid., 1887, p. 370; ibid., 1892, pp. 177-180; ibid., 1895, p. 395; ibid., 1896, pp. 208-209; ibid., 1915, pp. 435, 645; 50th Cong. Rec., pt. 6, pp. 5345-5346; MSS. Notes to Ger. Leg., X, 112; 196 MSS. Dom. Let., 118.

partment of the government. Chief Justice Marshall [18] has declared that treaties of extradition are executory in nature, but when the terms of the stipulations import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department.[19] In Ex Parte Thomas, the court held: [20]

> The question whether the power remains in a foreign country to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department.

It is evident that the ability to perform was the principle used by the courts in determining the continuance of treaties following a cession. It is also true that termination of ability to perform was considered a political question decided by the political department of the government whose decisions were executed by the courts. However, the courts may determine what the decision of the political department in a particular case may be. This is true because the vital duty of selecting the arguments and opinions of the official documents in an effort to discover the ruling of the political department has been left to the courts.

A peculiar situation arose in connection with Alsace-Lorraine. When Alsace-Lorraine was annexed by Germany in 1871, the United States contended that the Franco-American treaties of naturalization and extradition of 1843 and 1845 were in force in these provinces.[21] This contention was made although France certainly was unable to enforce the treaties, and the execution of a French treaty in the territory of Germany by the latter, a party not represented in the agreements, presented an extraordinary spectacle. It was recognized at the time that such a contention was made merely because the German treaties had not been extended to Alsace-Lorraine and cases were constantly arising in which there was need of a

[18] Foster v. Neilson, 2 Pet. 314.
[19] Quoted in Terlinden v. Ames, 184 U. S. 270; Ex parte Thomas, 12 Blatch. 370.
[20] 12 Blatch. 370.
[21] Fish to Bancroft, Apr. 14, 1872, For. Rel. 1873, No. 132, I, 279-282.

determining convention. The unsatisfactory character of the situation was recognized by the United States State Department when it pressed for the conclusion of new treaties with Germany which would include these new territories.[22]

The treaties of former states absorbed into the German and French colonial empires were terminated by such annexation. Thus the American treaties with the Sultan of Zanzibar fell to the ground on the purchase of Zanzibar by Germany,[23] and the treaties of the United States and the Hova government of Madagascar were extinguished by the annexation of Madagascar by France.[24]

The annexations and absorptions of formerly independent states attendant upon the unification of Italy presented cases somewhat similar to those of the German Empire. The Treaty of 1858 with Sardinia was regarded by the United States as in force with respect to Sardinia even after the erection and unification of the Kingdom of Italy.[25] This contention was sustained by the Italian government, but a controversy arose as to the effect of the treaty of the United States with Sardinia on the treaties with other states of the Italian kingdom which America had secured prior to the unification.

The controversy centered about the effect of the Sardinian annexation of the Kingdom of the Two Sicilies on the conventions which the United States had contracted with the former. The Italian government contended the Sardinian

[22] See correspondence, For. Rel. 1873, I, 279-282; For. Rel. 1892, pp. 177-180; For. Rel. 1896, pp. 208-209; Blaine to von Schlozer, Nov. 29, 1881, MSS. Notes to Ger. Leg., X, 112; and discussion in Moore, Dig. of Int. Law, V, 353-354.

[23] Case of the Sultan of Muscat and the annexation of Zanzibar by Germany in Moore, Dig. of Int. Law, I, 332, citing Blaine to Phelps, Feb. 27, 1891, MSS. Inst. to Germany, VIII, 417, and Adee to Phelps, May 20, 1891, ibid., p. 520. Dec. 22, 1890, Germany notified the United States of purchase of Zanzibar; the United States objected to the collection of a 5% tax by Germany under the treaty of 1833 with Zanzibar.

[24] For. Rel. 1896, p. 67, Report of Olney to the Pres. For. Rel. 1897, pp. 152, 153, Dec. 12, 1896, Olney to Eustis, the United States gives up its extraterritorial rights.

[25] MSS. Notes to Turkey, I, 170, Fish to Aristarchi Bey, Sept. 18, 1876; also Moore, Dig. of Int. Law, V, 345, and Hyde, Am. J. Int. Law, XXVI, 133 note. Also For. Rel., Dip. Cor. 1864, IV, 327-335; and MSS. Notes to Italy, VII, 53.

treaties extended over the Two Sicilies and the agreements of the latter were abrogated [26] at the time of the union. On the other hand, Mr. Fish wrote: [27]

> The United States, at the time of that conquest had a treaty of commerce with the Two Sicilies, which it did not regard as cancelled thereby; nor did it regard the treaty of commerce which it had with Sardinia itself as applicable either to the Two Sicilies or to the States of the Church.

Mr. Marsh wrote to Mr. Seward: [28]

> Our treaty with Sardinia differs in many particulars from the last treaty concluded between the United States and the Two Sicilies. I am told that the Italian government regards all treaties between foreign states and the Kingdom of the Two Sicilies as abrogated, at least for most purposes, by the annexation of that Kingdom to Sardinia, and considers the treaties between these states and Sardinia as extending to the whole kingdom. It is easy to see, however, that upon the revival of our commerce with Sicilian ports it may become an important question whether we are not entitled to the rights and subject to the responsibilities established by the treaty with the Kingdom of the Two Sicilies so far as regards our commercial obligations in those ports.

Had the treaties with Sardinia and those with the Two Sicilies been identical, or nearly so, the controversy might not have arisen. Actually the United States had negotiated only a limited commercial and navigation treaty with Sardinia,[29] but had contracted a comprehensive treaty of amity, commerce, navigation, and extradition with the Two Sicilies, as well as a convention relative to the rights of neutrals at sea.[30] If the United States had accepted the Italian position, it would have lost many rights and responsibilities secured by the treaties with the Two Sicilies, which were not granted in the treaty with Sardinia. Moreover, it may be observed that the most important part of the treaty with the Two Sicilies not included in the Sardinian convention was the group of articles relating to extradition. The United States had previously maintained that extradition treaties remain in force after a change of sovereignty, except in a case of patent inability on

[26] For. Rel., Dip. Cor. 1864, IV, 327-335.
[27] Fish to Aristarchi Bey, MSS. Notes to Turkey, I, 170.
[28] For. Rel., Dip. Cor. 1864, IV, 327-335.
[29] Malloy's Treaties, II, 1603.
[30] Ibid., II, 1804-1824.

the part of the successor state to execute them. In order to be consistent, the United States had to take the same position in regard to the Two Sicilies. Further, it would appear that the fact that the Two Sicilies were geographically distinct from Sardinia had some influence on the United States in deciding that the former Kingdom was still able to perform the treaty stipulations. This factor was confirmed when, immediately upon the final unification of Italy, the United States negotiated a new treaty with the Kingdom of Italy.[31]

A distinct problem arose in regard to the termination of the American treaties with Tripoli, Cyrenaica, and the Barbary powers. The disposition of them following the annexation of these countries depended upon the status of the territories, first in the Turkish, then the Italian and French nations.

Mr. Fish wrote to Aristarchi Bey:[32]

> The treaties of Algiers with other governments were also annulled by the conquest of that country by France. This conquest was made pursuant to a regular war of such notoriety that its origin, progress, and result could not fail to come to the knowledge of all the parties having treaties with Algiers and to be regularly recorded as an historical fact. Such was not the character of the contest by which the Porte acquired the ascendency which it afterwards claimed in Tripoli. That contest was of a comparatively obscure character, and, as was believed, had been but faintly and imperfectly recorded in the published annals of the time.

This dispatch introduced a novel insistence on the form and notoriety of the conquest as a criterion for determining the status of the treaties of a conquered state. An explanation of this may be found in the instructions given to the American minister at Constantinople in 1908:[33]

> 1. That the treaty of 1805 [with Tripoli] was made with all necessary formalities. 2. That prior to 1835 [date of the ascendancy of the Ottoman Porte over Tripoli], as well as after that date, the real sovereignty over Tripoli rested in the Ottoman Porte. 3. That inasmuch as prior to 1835 the Ottoman Porte permitted Tripoli to make war and peace and negotiate treaties, the treaties so negotia-

[31] For. Rel. 1864, No. 102, Seward to Marsh, June 15, 1864. Malloy's Treaties, I, 969.
[32] MSS. Notes to Turkey, I, 170.
[33] C. C. Hyde, Am. J. Int. Law, XXVI, 133-134, note.

ted must be considered as binding upon Turkey as well as upon Tripoli. 4. That the affair of 1835 was not in any proper sense a conquest by Turkey of Tripoli, but was merely the assumption by Turkey of a more complete governmental control over Tripoli. 5. That this being the true nature of the affair of 1835, Turkey cannot treat the earlier Tripolitan treaties as abrogated by conquest. 6. That Turkey herself, from 1835 until 1873, appears to have considered all treaties made with Tripoli prior to 1835 as binding upon her, Turkey. 7. That by making with Great Britain, France, and Italy, treaties in effect abrogating the earlier Tripolitan treaties with these governments and extending over Tripoli the general treaties of the Ottoman Empire, Turkey recognized that until Tripolitan treaties were so terminated or abrogated, they were of full force and vigor. 8. That as a resultant of the foregoing, it follows that the American Treaty of 1805 must be considered as of full force and vigor, until it shall be abrogated by a new treaty with the Ottoman Porte.[34]

These instructions presented the argument that: there was no change of sovereignty in 1835; there was merely a change in the governmental status of Tripoli as a province within the empire of the Porte, whereby the central government assumed greater local control; Turkey had already recognized the treaty of 1805 to be binding upon her as one of her own treaties; therefore the treaty could not be terminated by a claim of change of sovereignty following a conquest; consequently, the treaty was still valid because recognized. It is evident from this argument that treaties were not affected by a change in constitutional status. Its only application to the problem of state succession can be found in the implication that in case of a change of sovereignty a successor state might claim that a treaty made by the erstwhile sovereign could be annulled by the transfer.

A much different position was taken when Italy annexed the Tripolitan states. The United States held that the treaty of 1805 was extinguished by this cession. Mr. Hyde has written: [35]

Secretary Knox recognized 'the cessation of the special regime formerly enjoyed by foreigners in Tripolitania and Cyrenaica by

[34] Instruction to the American Minister at Constantinople of Sept. 3, 1908; State Dept. Numerical File No. 901.

[35] Hyde, Am. J. Int. Law, XXVI, 135; Malloy's Treaties, II, 1788; For. Rel. 1912, pp. 632-633; For. Rel. 1913, pp. 608-611; Malloy's Treaties, III, 2698-2699; Knox to Ambassador at Rome, Dec. 5, 1912, For. Rel. 1912, p. 633.

virtue of the capitulations of the Ottoman Empire,' and the substitution therefor of the 'disposition of the general law' of Italy. . . . There is ground for the conclusion that the action of Secretary Knox . . . amounted to an acknowledgment that Italy, by virtue of a principle of international law, was under no obligation to the United States to heed the terms of its treaty with Tripoli on which those privileges were stipulated.

Mr. Hyde attributed this difference in the action taken in the case of Turkey and that taken in the case of Italy to an inconsistency in American policy. It is submitted that the explanation of this apparent inconsistency lies in the difference of American policy in cases of internal governmental change as differentiated from cases of state succession. There can be no doubt that the United States has maintained the binding effect of the international agreements contracted by a government of a state on succeeding governments. However, a question may be raised concerning its position relative to the liability of a succeeding state for the promises of its predecessor. It is this question which is being discussed herein.

When Texas was acquired by the United States, Texan treaties were terminated:[36]

The Union between the United States and Texas was effected by the legislation of the parties. It necessarily cancelled the treaties between Texas and foreign powers, so far, at least, as those treaties were inconsistent with the Constitution of the United States.

This doctrine was incorporated in the joint resolution for the annexation of Hawaii. The resolution declared:[37]

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished and not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

In regard to these two annexations, Mr. Sherman wrote:[38]

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[36] Fish to Aristarchi Bey, MSS. Notes to Turkey, I, 170.

[37] H. J. Res. No. 55, July 7, 1898, 30 Stat. L. 750.

[38] Sherman to Toru Hoshi, June 25, 1897, MSS. Notes to Jap. Leg., I, 521, cited in Moore, Dig. of Int. Law, V, 349-350, and by Hyde, Am. J. Int. Law, pp. 26, 134. Also see Sherman to Hoshi, Aug. 14, 1897, MSS. Notes to Jap. Leg., I, 533, confirming this; and Hay to Romano, Mar. 7, 1899, MSS. Notes to Ital. Leg., IX, 337, cited in Moore's Dig. of Int. Law, V, 348-351.

The principle of public law whereby the existing treaties of a state cease upon its incorporation into another state is well defined by Halleck, who says, 'But the obligations of treaties even where some of their stipulations are in terms perpetual, expire in case either of the contracting parties loses its existence as an independent state, or in case its internal constitution is so changed as to render the treaty inapplicable to the new conditions of things.' . . . It needs no stipulation in a formal annexation treaty to work this result, for it attends de facto annexation however accomplished. . . . The admission of Texas into statehood in our Union by joint resolution extinguished the treaties of the independent Republic of Texas. . . . It is the fact, not the manner of absorption that determines treaties. . . . The treaty of annexation does not abrogate those instruments, it is the fact of Hawaii's ceasing to exist as an independent contractant that extinguishes those contracts.

It is submitted that this statement was not in conflict with the policy of determining the continuation of a treaty on the basis of the ability of the annexed territory to perform the stipulations of that treaty by the territory annexed. On the contrary, this official opinion actually corroborated it. *De facto* conditions may be the criteria upon which "ability to perform" can be judged. The cases which Mr. Sherman cited were cases in which the United States had ruled that the *de facto* conditions necessary to enable the territories annexed to fulfill their treaty stipulations did not exist. Mr. Sherman reasoned that since the *de facto* conditions in Hawaii were similar to the *de facto* conditions that existed in previously decided cases, and since such conditions had been held to prove the inability of a territory to execute its treaties, Hawaii was unable to perform its treaty obligations and the treaties consequently must be terminated. Mr. Sherman did not state that conditions could not exist in an acquired territory which might permit it to carry out the provisions of its treaties. His statement intimated that if favorable *de facto* conditions existed in the territories, their treaties would continue to operate. Mr. Sherman held that such circumstances were not in existence in Hawaii; therefore the Hawaiian treaties fell to the ground.

The policy of the United States has been less involved when the territory of a nation has been divided into new states. When Norway separated from Sweden in 1905 and established an independent state, the foreign offices of both countries

respectively informed the United States that they were released from all conventional and treaty responsibilities as far as the other nation was concerned: [39]

> On the other hand, the Swedish Government is of the opinion that the above-mentioned instruments jointly concluded by Sweden and Norway, continue in full force and effect as regards the relations between Sweden and the other contracting party or parties, without any modification whatever of the provisions that have heretofore regulated such relations being required by the dissolution of the union between Sweden and Norway. . . . In the meanwhile the Swedish Government deems all agreements concluded by Sweden, whether separate, or jointly with Norway, to be valid in regard to the relations therein considered between Sweden and the respective states.

The position taken by these two governments was immediately recognized by the United States.[40] The treaties of the two countries acting in concert continued unaffected by the separation of the nations until they were replaced by new conventions,[41] except in regard to the responsibility for carrying the treaty stipulations into effect in the other state's territory.

When the Republic of Colombia won her independence from Spain, the United States declared that the Treaty of 1795 with Spain, which upheld the doctrine that free ships make free goods, continued in effect and force upon Colombia until that country had contracted a new treaty with the United States abrogating the old one. Mr. Adams, in a dispatch to Mr. Anderson, said: [42]

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[39] Grip to Sec. of State, Nov. 20, 1905, For. Rel. 1905, p. 872; Hague to Sec. of State, Dec. 7, 1905, For. Rel. 1905, p. 873.

[40] For. Rel. 1905, pp. 872-874, see acknowledgment without comment.

[41] U. S. v. Howe, 231 F. 546: the Naturalization convention of 1869 with Sweden and Norway was not considered in force in 1905, notwithstanding the separation of those kingdoms.

Engen v. Union State Bank of Harvard, 235 N. W. 751: treaty of 1873 with Norway and Sweden as to the right of aliens in homestead valid with reference to Norway on May 22, 1931.

In re Peterson's Estate, 151 N. W. 66: treaties of 1783 as modified by those of 1816, and 1827, between Norway and Sweden and the United States in force as to alien property rights as regards Sweden Jan. 22, 1915. Duus v. Brown, 245 U. S. 176, held the same to be true.

[42] Mr. Adams to Mr. Anderson, May 27, 1823, 13 Brit. & For. State Pap., pp. 480-481; Moore, Dig. of Int. Law, V, 341; Moore, Int. Arbs., pp. 3221-3227.

It is asserted that by her declaration of independence Colombia had been entirely released from all her obligations by which, as a part of the Spanish nation, she was bound to other nations. This principle is not tenable. To all engagements of Spain with other nations affecting their rights and interests, Colombia, so far as she was affected by them, remains bound in honor and in justice.

When Colombia in turn was divided into the Republics of Venezuela, Ecuador, and New Granada, cases arose involving claims against the former state of Colombia for damages on account of depredations on American commerce in violation of the treaty of 1795. These claims were presented to each of the succeeding republics, and representations were made for the payment of such claims on the basis of the continued existence of the treaty of 1795.

The most notorious of these cases was that of the "Mechanic," an American ship captured by Colombia and condemned for prize.[43] In presenting this case to the government of New Granada for adjustment, Mr. Forsyth, Secretary of State, wrote Mr. Semple that the treaty of 1795, except as to parts obviously temporary in their nature, was unlimited in duration:[44]

The article containing the stipulation adverted to [free ships make free goods], having, therefore, been agreed to while Colombia was a Spanish possession, continued obligatory upon that country not only so long as it remained subject to Spain, but after it had achieved its independence and had been acknowledged by the United States. It is presumed that the government of New Granada will not deny the correctness of this doctrine, as it has so recently given a practical acknowledgment of it by assenting to the operation within its territory of the treaty between the United States and Colombia, after the dissolution of the Colombian confederacy and until that covenant expired by its own limitation.

The same stand was taken by the American Commission in presenting the case of the "Mechanic" to the Venezuelan Commission:[45]

It has been suggested in argument, as indeed it seems to have been claimed by the American Minister at Bogota in 1824-1827, that Colombia, having been Spanish territory at the time, was bound as to the United States by the treaty between the latter

[43] Moore, Int. Arbs., III, 3221-3227.
[44] Forsyth to Semple, Feb. 12, 1839, MSS. Inst. Colombia, IV, 58; Moore, Dig. of Int. Law, V, 342.
[45] Moore, Int. Arbs., III, 3223.

and Spain, of 1795, which embodies the doctrine that 'free ships make free goods,' making its violation an act of piracy; and that such obligation continued during her struggle for independence.

The American Commissioner before the Ecuadorean Claims Commission and the Umpire, Mr. Hausserek, agreed that:[46]

When this treaty [the treaty of 1795] was made, the subsequent Republic of Colombia was part of the Spanish Empire, and the public laws and treatics of Spain were binding on all her subjects, whether in Europe or America. From the obligations that treaty imposed on the whole Spanish nation, the Republic of Colombia could not free herself by her subsequent declaration of independence. That a state never loses any of its rights, nor is discharged from any of its obligations by a change in the form of its civil government, is one of the fundamental principles of international law. It applies to cases such as the one before us, where one part of a nation separates itself from the other. It is evident that on the creation of a new state, by a division of territory, that new state has a sovereign right to enter into new treaties and engagements with other nations; but until it actually does, the treaties by which it was bound as a part of the whole state will remain binding on the new state and its subjects.

This same doctrine, that on a state separation the treaties of the former state continue in respect to the portion separating therefrom, was adopted when the Texan Republic gained its independence:[47]

In 1838 the Treasury Department of the United States instructed collectors of customs to give the benefits of Articles V and VI of the treaty of commerce between the United States and Mexico of April 5, 1831 . . . to the vessels and products of Texas.

In return the Texan government was advised that the same benefits should be given United States vessels and productions. This position was maintained by the United States throughout the subsequent controversy.[48] However, when the United States annexed the Spanish Islands in 1898, there was a distinct modification of this doctrine. The War and State Departments advised that the Spanish treaties of commerce were no longer in effect in regard to the islands relinquished or ceded.[49]

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[46] Ibid., III, 3224-3227.

[47] Moore, Dig. of Int. Law, V, 343.

[48] Ibid., V, 343-344; Forsyth to La Branche, No. 6, Feb. 24, 1838, MSS. Inst. to Texas, I, 6; same to same, no. 9. May, 2, 1838, ibid., I, 9; Vail to La Branche, no. 16, Oct. 25, 1838, ibid., I, 14; Webster to Eve, no. 1, June 14, 1841, ibid., I, 31.

[49] Magoon, pp. 303-305, 316-338. Hay to Sec. of War, Nov. 10,

In the case of the German, British and Spanish tripartite treaty concerning commerce in the Sulu Islands, Mr. Magoon advised the War Department that the treaty was not in force.[50] He did this on several grounds. First, he quoted Hall to the effect that treaties of alliance, of guarantee, or of commerce are not binding upon a new state formed by separation.[51] And then he quoted Halleck:[52]

'But the obligations of treaties, even where some of their stipulations are, in their terms, perpetual, expire in case either of the contracting parties loses its existence as an independent state, or in case its internal constitution is so changed as to render the treaty inapplicable to the new conditions of things.'

Just how applicable the last quotation may be to the case in question is quite doubtful, for Spain did not lose her independent existence, and the Sulu Islands never had any. Evidently, Mr. Magoon felt that the phrase "or in case its internal constitution is so changed as to render the treaty inapplicable to the new conditions of things" was useful, because there certainly was a new condition of things, although it was not of the sort of which Halleck was speaking. What was important was the statement that this doctrine originated in the fact that the grant of permission to foreign nations to trade with its subjects was an act of grace on the part of a sovereign.[53]

It was argued that an act of grace was a personal act granted by the old sovereign personally, establishing neither a lien on the territory undergoing the cession, nor an obligation on the new sovereign.[54] Unfortunately an analogy was drawn between private debts and treaty obligations, in order to apply the doctrine that one man cannot be bound by the personal promises of another.

A much stronger position and one more in line with the consistent American policy might have been taken. It could have been claimed that the territories acquired from Spain

1899, 241 MSS. Dom. Let. 157; Hay to Sec. of Navy, Jan. 24, 1900, p. 242, ibid., p. 376. See Moore, Dig. of Int. Law, V, 351, 352.

[50] Magoon, pp. 302-305, 316-338.

[51] Hall, p. 98.

[52] Halleck, I, ch. viii, sec. 35.

[53] Magoon, p. 327.

[54] Ibid., pp. 326-331.

were completely absorbed in the political system of the United States and therefore they were incapable of executing the treaties.

It is significant that these treaties were considered commercial, personal, and an act of grace of the sovereign. This implied that such treaties were distinct from extradition and naturalization treaties and the doctrines, applicable to the latter, were not applicable to the former. Nevertheless, in the face of the past practice of the United States in regard to extradition and naturalization treaties such an approach would appear unwarranted.[55] As was stated above, the position of the United States would have been strong if it had been claimed that the territories annexed by the Treaty of 1898 were incapable of executing the stipulations of former treaties.

The extension of the treaties of an annexing country over the country annexed is quite a different problem that the termination or continuation of various conventions previously contracted by the annexed territory:[56]

> It does not even follow that the existing treaties of the absorbing state extend to the acquired territory. The treaties of the German Empire are held not to apply to the ceded French provinces of Alsace and Lorraine.

The same position was taken by the United States customs authorities in regard to a commercial treaty with Great Britain. In 1871 the United States had contracted a treaty with Great Britain for the free admission of certain produce of the fisheries of the Dominion of Canada, or Prince Edward's Island.[57] A month after signing the treaty, British Columbia

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[55] In regard to Cuba, Memo. of Dept. of State, For. Rel. 1901, p. 225, cited in Moore, Dig. of Int. Law, V, 352: "With reference to the British Embassy's confidential memorandum of May 31, 1900, the United States government does not regard existing treaties as embodying rights and immunities of British subjects in Cuba, Cuba's affairs having been withdrawn from British treaties with Spain and not having been embraced by British treaties with the United States, which antedated intervention." An enclosure contained an opinion of Atty. Gen. Griggs of April 26, 1900, which held that the rights and immunities of foreigners in Cuba were governed by the Spanish alien law of 1870 which was held to be in force in Cuba.

[56] Sherman to Toru Hoshi, June 25, 1897, MSS. Notes to Jap. Leg., I, 521.

[57] Treaty of May 8, 1871, Art. XXI, Malloy's Treaties, I, 700.

was admitted as a part of the Dominion of Canada. It was on the assumption that this treaty did not extend to British Columbia on the accession of that province to Canada that the American customs authorities refused to admit certain fish produce from British Columbia. Their action was sustained by the English advisers to the Canadian province.[58]

When France annexed the Island of Madagascar, the United States asked the government of the French Republic if its treaties extended over that island.[59] The French foreign office replied that it was disposed to extend to the great African Island the whole of the conventions applicable to the government or citizens of the United States in France and in French possessions.[60]

In the Franco-American treaty of 1904 the United States relinquished its right to invoke stipulations of its treaties with Tunis in that territory. The Treaty of 1904 provided that the Government of the French Republic agreed, on its side, to extend to American citizens in Tunis the advantage of all treaties and conventions existing between the United States and France.[61] The existence and wording of the treaty certainly implied that the French treaties did not extend *ex proprio vigore* over Tunis when it was annexed. In 1902 the

[58] See Moore, Dig. of Int. Law, V, 352-355, citing Derby to Thornton, Aug. 11, 1875. 66 Brit. and For. State Pap., 963, 968.

[59] Olney to Patenotre, Feb. 26, For. Rel. 1896, p. 119.

[60] Patenotre to Olney, Apr. 18, 1896, For. Rel. 1896, p. 124. For a discussion of the whole correspondence between the United States and France regarding Madagascar, see Moore, Dig. of Int. Law., V, 347-348, citing dispatches included in For. Rel. 1886, pp. 119-135 inclusive, and also Adee to Beramji, Dec. 10, 1896, 223 Dom. Let. 304.

It is of note that the United States Department of State, "presumed that subjects of Waldeck are entitled to the rights and privileges of existing treaties between the United States and Prussia." Moore, Dig. of Int. Law, V, 354, citing Gresham to Scott, Mar. 19, 1894, p. 196, MSS. Dom. Let. 118. But it is not known to the writer whether this referred to the treaties with Prussia made before the incorporation of Waldeck, or those made by Prussia after this occurrence.

Also it is of interest that Japan in taking over the Loochoo Islands did not extend her commercial treaties with the United States over them, but preferred to protect the American rights gained under those treaties contracted with Loochoo prior to the annexation. Moore, Dig. of Int. Law, V, 346-347, and Moore, Int. Arb., pp. 5046-5048.

[61] Malloy's Treaties, I, 544-545.

United States and France deemed it necessary to draw up a convention extending their agreement of 1898 to Algeria and Puerto Rico.[62]

In Cuba the treaty rights of the British under American treaties were not extended,[63] nor were the privileges of extra-territoriality given to American citizens in China extended to inhabitants of the Philippines.[64]

It would certainly appear that the United States has felt that the extension of the treaties of a succeeding state to the territory acquired does not proceed automatically on the change of sovereignty. Rather, such extension has been considered either an act of grace of the annexing government, or controlled by the public law of the acquiring nation.[65]

In the United States the extension of treaties to territories is a power of Congress, just as is the extension of the Constitution. Certain treaties may be extended by the negotiation of subsequent conventions. It is possible that Congress may extend treaties to regions which the Constitution does not fully govern.[66] However, wherever the American Constitution has been extended, all the treaties of the United States will probably follow, because Art. VI, sec. 2 of the Constitution provides that all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.[67]

It is evident from the foregoing that the United States has not adopted any blanket rule that changes of sovereignty do not affect the treaty obligations of the territory undergoing such a change. In its place the United States has established

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[62] Ibid., pp. 542-544.

[63] For. Rel. 1901, pp. 225 ff.

[64] For. Rel. 1900, pp. 901 ff.

[65] Secretary Knox announced ". . . the cessation of the special regime formerly enjoyed by foreigners in Tripolitania and Cyrenaica by virtue of the Capitulations of the Ottoman Empire and the substitution therefor of the *dispositions of the general law* of Italy." Hyde, Am. J. Int. Law, XXVI, 135, citing For. Rel. 1912, p. 633, and For. Rel. 1913, pp. 608-611.

[66] See the above chapter on the effect of a change of sovereignty on public law. The United States has followed the same practice in regard to the extension of treaties as it has other public laws.

[67] Constitution of the United States, Art. VI, sec. 2.

the doctrine that in cases where a state undergoing a transfer of sovereignty is able, after the transfer and because of the actual political and economic conditions, to execute the provisions of treaties previously contracted, the treaty of such acquired territory will not be considered terminated. The criterion of judgment is, therefore, the ability of an acquired territory to perform its previous treaty obligations. This ability, in turn, is judged on the basis of the *de facto* conditions existing in the territory involved. It has been found that *de facto* conditions do not warrant the continuance of treaties in cases of complete annexation and absorption. On the other hand, it usually has been found that the *de facto* conditions do warrant the continuation of treaties in cases of federation, and in cases of the division of an old state into one or more independent parts. Furthermore, it appears that the extension of the treaties of a new sovereign in any case is considered an act of grace and depends entirely upon the will of the succeeding sovereign.

CHAPTER VII

The American Theory of State Succession

From the foregoing examination of the practice of the United States relative to the effects of state succession, one conclusion is obvious. There exist two distinct categories of rights and obligations, public and private, and each has been treated differently.

None of the doctrines heretofore formulated by the publicists can adequately explain the policy of the United States in regard to both of these categories. It cannot be said that America has assumed all the rights and obligations of ceding states as if it were the preceding sovereign. Neither can it be said that the United States has accepted all of the powers of the ceding state and rejected all of its obligations. Each principle has its usefulness. Each doctrine may explain the action of the United States in regard to one of the two categories of rights and obligations. But, as a blanket explanation of all of the effects of a change of sovereignty, or as a rigid system in which all of the attendant phenomena fit, either principle is manifestly inapplicable.

For instance, an American court has held that on a change of sovereignty, "The people change their allegiance; their relation to the ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed." In regarding this statement of policy it cannot be said, "this is continuity," or, "this is discontinuity," as so many have attempted to do. Both explanations may be correct when applied to the proper class of rights and obligations and wrong when applied to another.

These doctrines do not explain the phenomena and their relationships, but merely name them. Their proponents have lost sight of the main proposition. The important problem is the difference in the way the two classes of rights, obligations, and relations have been treated. Why is one group affected by the change of sovereignty and the other continuous, un-

affected? It is upon the answer to this "Why" that speculations concerning the future action of a state in like cases may be based.

Why are private rights and obligations, private property, private relations and the private law which controls and protects them upheld by a successor state and unaffected by the change of sovereignty?

It has been generally accepted that one of the fundamental purposes of a state and its government is to protect private property and private rights. The principle of the sanctity of private property is an axiom of present society. To disturb the rights of individuals in their right to property, life, liberty and the pursuit of happiness is to disturb the very foundations upon which America was built. Why this principle was chosen, it is not the purpose of this study to discover. Let it suffice that the evidences of its assumption are everywhere, that it is a reliable underlying legal, political, social, and economic fact.

Another explanation is the generally accepted rule that the rights of third parties are to be safeguarded. This doctrine is a derivative of the sanctity of the rights of private persons. It developed in private law as a result of the effort to protect individual rights, but has been adopted in public law for the protection of rights of individuals, not only in relationships between private persons, but in relationships between private and public persons, and even those between public persons alone. It has been applied to treaty rights, contractual rights, property rights, and the so-called inherent rights of man.

The significance of this doctrine in relation to the distinction between private and public political rights and obligations is clearer if it is recognized that private persons may have both a civil and a political capacity. Private persons in their civil capacity in a particular territory may be, and have been, considered as third parties to the acts bringing about a change of sovereignty. In their private capacity they have been considered not responsible and unconnected with the negotiations and political acts of the national political organiza-

tion in its relations to other states. On the other hand the state, its agencies, and all the persons connected with it in a political capacity exercising political rights and powers because of their public status have been considered active participants in the acts bringing about the political changes. As such, any political status, rights and powers that they may enjoy may be affected by a change of sovereignty.

Another doctrine, arising from the same source, has been accepted by the United States. It applies to the obligation of the state to protect the life, liberty, and property of its inhabitants on accepting them into its political union in return for the rights and privileges of sovereignty which become vested in the state as a correlative part of the relationship. This is the ancient Roman private law doctrine, *res transit cum suo onere.* However, it must be constantly borne in mind that this principle has been accepted only in relation to the above group of rights and obligations.

On turning to the question of why public and political rights and obligations are affected by a succession of states, the answer may be found in the acceptance of the juristic concept of the state by the American courts.

The state is a unique legally omnipotent person qualitatively different from its territory, population, and political organization. In the state, and in it alone, rests sovereignty—a legal power which is indivisible, unlimited and supreme. The state has particular ends, policies and purposes differing from those of any other state or of any of its own parts. It pursues these ends through the exercise of the sovereign power by its government, its public institutions, and through its public laws. It contracts public obligations and conventions necessary to the carrying out of its purposes. Yet the agencies, the institutions, the acts and the contracts of the state constructed and operated in the exercise of its sovereignty are not the state, nor the sovereign power itself. In many instances they may be self-imposed limitations upon the exercise of that sovereign power. It is because of this distinction between sovereignty and the agencies exercising it, it is because the

public laws, obligations and institutions may be and usually are self-imposed limitations of the exercise of the sovereign power, and the acceptance of the fundamental doctrine that one person cannot be bound by the promises of another, that the sovereign power of a state has been transferred to another without the transfer of the agencies, the institutions, the laws and the obligations which derived from the exercise of that power. A new state feels that it has its own destiny to fulfill, and must be unhampered in its actions by the acts and institutions of another state which built the structure in seeking its own separate ends.

The existence and adoption of such a concept explains the "personal contracts" and "personal obligations" doctrine developed and used by the United States when dealing with contracts and obligations undertaken by a national government for state purposes. The existence of such a concept is behind the continual use of the quotation from Hall:

> With rights which have been acquired and obligations which have been contracted by the old state as personal rights and obligations, the new state has nothing to do. . . . The new state on the other hand is an entirely new being. It neither is, nor does it represent, the person with whom other states have contracted.

The effect of the concept is indicated in Griggs' statement:

> Spain is regarded by the law of nations as having a personality of her own distinct from that of the power which has succeeded her in control of the ceded territory.

Further it explains the position taken by the American Commissioners of 1898 at the Peace Commission meetings in Paris.

The line of demarcation between relationships of a public character and those of a private nature is not as clear and distinct as might be wished. The relations between public persons, the laws governing them, and those rights, powers, privileges and obligations pertaining to them belong to the former category, while the relations of private persons to one another are placed in the latter.

In speaking of "public persons," the term is used to de-

note the state, its agencies and officials; in short, every person, entity, or organization exercising powers derived from or delegated by the sovereign. "Private persons" includes that group defined as such by the practice of the courts, a group which exercises or is delegated none of the sovereign power.

Although the distinction between public and private persons may appear to be clear, there are borderline cases which are confusing. In these cases the entities may be public persons for one purpose and private persons for another. Parties may exercise both functions, that of an agency connected with and gaining rights and privileges from the sovereign, or private individuals with aims, ends, and powers which legally have nothing to do with the exercise of sovereignty. Municipalities and ecclesiastical bodies exemplify this dual type. The former have been recognized as exercising both public and private functions in the political system of the United States. The latter have often been found to exercise both functions under governments ceding territory to the United States, but have been allowed to exercise only the private function under the American system.

The relations between a public person and a private person, that is, between the state and an individual, may be considered as belonging to the category of relationships of a public nature. This is true because such a relationship is affected by a change of sovereignty. Also the fact that this relationship is affected may be explained in the same manner as the fact that the relations of one public person to another are disturbed by state successions. For instance, originally a relationship between an individual and the ceding state existed; the ceding state was replaced in the territory by the acquiring state; the acquiring state is neither identical with nor representing the ceding state. The relationship was not between the individual and the acquiring state; when the ceding state disappeared, the relationship dissolved; but if the ceding state remained in existence the relationship would continue, but only between the individual and the impaired ceding state. The acquiring state, being legally sovereign, no legal obliga-

tion may be imposed upon it that is not self-imposed. Inasmuch as this relationship, if imposed on the acquiring state, might consist of an obligation on that state and thus limit its sovereign power, the acquiring state probably would not accept such an obligation as a legal proposition because a prime purpose of a state is to protect its sovereign power.

There are forms of the relationship between public and private persons which call for a modification of this doctrine and line of approach if the sanctity of private property, that other foundation stone of the American policy, is not to be violated.

The first type of such relations is a loan by the individual to a state on various pledged securities. In the second type, the individual constructs and operates sundry buildings, works, and services for a state in return for payment in the form of special rights and privileges, or for monetary remuneration.

The successor state will undoubtedly hold that the obligations arising from contracts made by the ceding state have no legally binding effect on it, the acquiring state. If the acquiring state were to admit any legal liability for such contracts made by its predecessor, it would impair its sovereign power. If a state were to admit such liability, it would be bound by the obligations of a totally different state, contracted for the separate and unique purposes of that state. No state is apt to make such an admission without excellent cause.

On the other hand, private individuals gain rights under these contracts. These rights are injured either by the disappearance of the second party to the agreement, or by the diminution of its resources. The creditors who loan money to the ceding state are injured by the cession whether they loan on the security of the public faith and credit only, or upon the hypothecation of the debt on particular territorial resources. In the first case, the public credit is diminished by as much as the resources upon which that credit was founded are alienated. In the second case, the particular territory and resources which are the creditors' specific security

may be transferred. The private contractors who constructed and operated public services in the territory ceded also are injured. The ceding nation loses the power to guarantee them the special rights and privileges they were promised in payment for their work. Furthermore, a ceding state will not continue to pay contractors for services or creditors for debts which no longer benefit it.

It is granted that a fundamental policy of the United States is to protect private rights. The way in which the successor may completely protect the rights of individuals involved in these cases is by the full assumption of such public obligations and contracts. Thus the state finds itself upon the horns of a dilemma. The sovereignty of the state must be rigidly and unqualifiedly protected, but also the private rights and property of the creditors and contractors, private persons, must be secured. The general rule that all of the public contracts and obligations transfer from the old state to the new cannot be applied without violating the concept of the unique personality of the state and the legal omnipotence of the sovereign power. Nor can the rule be employed that all these contracts and obligations must fall to the ground, for that would injure the rights and property of private individuals and run counter to a fundamental purpose of the state.

Out of this conflict of principles and traceable to both of them, has arisen the practice of treating such obligations in a particular manner. In American practice these obligations have been held to place no *legal* obligation on the acquiring state, but they have been found to place an equitable obligation on the successor nation, in certain circumstances, the United States being the judge as to what the equitable rights of the individuals against it may be. Thus both purposes of the state have been achieved.

In order to carry out this policy, the doctrine that burdens pass to the successor state in relation to the benefits received by it, has been evolved, or borrowed from the field of private law. This doctrine has been applied as a device for measuring the extent of the liability of the annexing state to the private

persons loaning to or contracting with the ceding state. This principle is distinctly a modification of the two rules that the burdens of the old state do or do not pass to the successor. It is an outcome of their interaction and is caused by an attempt to apply and be consistent with both.

The doctrine that "the burdens pass with the benefits" appears to be the determining rule in the cases examined. Thus the form of a loan or contract seems to be unimportant except as evidence that a contract or loan is made for the benefit of a locality or territory acquired by the United States. An assumption that this observation is correct may explain some apparent inconsistencies. Several of the Texan loans pledged the public faith and resources of the Texan Republic for their redemption and particularly imports and customs tariffs. Thus some of these general loans came within the purview of the Congressional Act of 1850 when Congress assumed an equitable obligation for the payment of Texan debts of certain types. The American delegation to the Paris Peace Conference of 1898 refused to consider any assumption by the United States or Cuba of a loan formally hypothecated on the revenues of that island. Thus, in one case the United States accepted liability for a general loan, yet in another it opposed the placing of any liability on Cuba for a loan formally hypothecated on the revenues of the island.

However, in the case of Texas, the contracts and loans negotiated by the Texan Republic were made for the construction, development, organization, and government of the territory; in short, for its benefit. Such benefits necessarily passed indirectly to the United States on the complete annexation of the territory. In the cases of the Spanish insular possessions, the Spanish loans and contracts were designed to aid the national Spanish government in the prosecution of hostilities against the rebellious islanders and against the United States. Neither the United States nor Cuba could be said to have benefitted by such loans. However, even in the successions following the Spanish-American War the obligations contracted by Spain for the erection of public works and the improvement and operation of services in the islands

acquired, other than Cuba, were indirectly assumed by the United States: that is, through the payment of a stipulated sum to Spain for the liquidation of such obligations. This demonstrates that the United States has clung to the doctrine that "burdens pass with the benefits," in spite of the form of the contracts.

Generally, the hypothecation of a debt on a locality or its resources is considered as *prima facie* evidence that the debt was contracted for purposes benefiting that locality. When such hypothecated debts and contracts establishing a definite lien on a territorial resource were made, an express security was pledged which was taken into account by the creditors on entering into the agreement. On the transfer of sovereignty the successor state received this territory or resource and henceforth enjoyed both the benefits arising from the territory or resource itself, and the benefits conferred on it by the contracts and loans negotiated by the former sovereign. On the basis of the enjoyment of such benefits, the United States, when it has been the successor state, has held itself to be equitably obligated to the contractors and creditors.

However, when no express lien on the territory has been established by the contract or loan drawn up by the ceding state, creditors have been considered as loaning or contracting on the public faith and credit of the ceding sovereign. In such cases, it has been assumed by the acquiring state that the creditors realized and took into consideration the risk that such credit might be injured or bettered in the future by various circumstances, among them changes of sovereignty. Because the creditors have been presumed to have entered into such contracts cognizant of this risk, the United States when it has been the acquiring state has not felt itself equitably liable to such creditors for such loans or contracts.

The doctrine that burdens pass with the benefits has been construed rather strictly. If the benefits of a certain obligation passed to a certain local entity and were enjoyed by it, that body having the power to use and control those benefits and resources also received the burdens placed upon them. This was the procedure in the cases of Hawaii and Texas. In

the latter case, part of the benefits derived from the expenditure of the public loans of the Texan Republic passed to the federal government of the United States and part to the State of Texas; therefore each political unit assumed a portion of the equitable burden in relation to the benefits it received.

Other forms of the public relationship in which, in many cases, the general rule is modified by the introduction of conflicting rules and purposes are treaties, conventions, and agreements. These are contracts between sovereign persons. Because they are contracts between sovereign persons, the rule that one person cannot be legally bound by the promises of another may be applied to them. It has been shown that this rule results from the acceptance of the juristic concept of the state and its sovereignty. Thus a succeeding state will consider itself not a party to the agreement and therefore not bound by its provisions. However, in cases of state succession, various factors come into consideration which affect the actual practice of the nations in terminating or continuing a treaty or convention regarding a territory undergoing a change of sovereignty.

Treaties and conventions may be divided into two general groups, which for lack of a better terminology may be described as "political" and "civil." Included in the term "political" agreements are treaties of alliance, guarantee, and treaties which express a particular personal international policy. Such treaties are contracted by the state for the protection, security, development, and operation of the state itself, its ends, aims, and purposes, as a distinct and unique being. Included in the term "civil" agreements are treaties and conventions of commerce, navigation, extradition, and naturalization. This class includes those agreements contracted by a state in order to protect and regulate the rights, interests, and intercourse of its nationals at home and abroad, a purpose which is held in common by most of the sovereign states of today.

These two groups of agreements, "political" and "civil" conventions, are treated differently because of two fundamental

purposes of the state: the protection of its juristic concept of sovereignty; and the protection of private rights and interests.

In contracting "political" agreements, the purposes of the ceding sovereign and those of the annexing state are not the same. A successor state does not desire to wear the old clothes of its predecessor. The succeeding nation does not wish to be bound by obligations contracted for carrying out purposes wholly different from and foreign to its own policy. Therefore, the new state applies the rule that one state cannot be legally bound by the promises of another, and the "political" agreements of the old state do not bind it. The new state is not substituted for the old state unless it agrees to such a substitution. Such an agreement, in effect, creates a new contract.

However, in the case of "civil" treaties the purposes of the various states are approximately, and fundamentally, the same: that is, the protection of private property and rights at home and abroad. In carrying out this purpose nations have entered into treaties on the basis of the commercial, legal, geographic, or economic conditions existing in a particular territory, and on the assumption that the parties to the treaty were able to perform the obligations of the convention. If the conditions upon which such a treaty was based remained the same, and if there were in the territory involved a government able to execute the treaty stipulations, there would be no reason for the abrogation of such a treaty merely because one of the parties had undergone a change of sovereignty.

A change of sovereignty may or may not alter one of the conditions upon which a "civil" treaty is founded. It is because this is true, and because of the number of variables involved, that is, the political, economic and social conditions and the various forms of state succession, that one finds such a diversity in the effects of a state succession on treaties.

For example, extraterritoriality treaties of the United States are based on the legal conditions of a country. If a territory is annexed by a state with laws and legal procedures which

guarantee a certain justice approximate to that of the United States, the legal conditions of that country are changed on the extension of the successor's system and jurisdiction over the territory, and there is no necessity for the continuation of the treaty. (Tripoli to Italy; Madagascar to France, etc.) In the case of extradition and naturalization treaties, the type, customs, habits, and condition of the people, their relations to the territories involved, and the purpose of the state to protect their rights all remain unchanged by a change of sovereignty. Therefore, if the successor state is able to perform the conditions of the treaty, this convention will continue in force in respect to the territory undergoing the state succession. In commercial and navigation treaties the geographic, physical, and economic conditions upon which they originally were based usually are not affected by a state succession, hence generally they are not terminated on a transfer of dominion.

The viewpoint that it is the effect on the conditions on which a treaty is based that determines the effect of a change of sovereignty on the "civil" treaties of a state undergoing such a change also explains another American policy. This is the practice of the United States in regard to the extension of its treaties over acquired territories. It will be remembered such extension has not proceeded on the change of sovereignty, *ipso facto*, or at the time of the transfer itself. Such extension has come about only when the former treaties regarding the acquired territory have been terminated, and when the acquiring state has, as an act of grace, extended its treaties to the annexed region. The treaties of the successor state made prior to the annexation also have been contracted with certain territory and conditions in mind. The territory annexed has not been included in such calculations; therefore the treaties based on such particular conditions cannot *ex proprio vigore* apply to territories and conditions not within their purview.

The important thing to remember in connection with the group of treaties denominated as "civil" is: if the conditions upon which such treaties were based remain unchanged by the transfer of sovereignty, and if there be a government

in the territory able to perform them, unless some other treaty supersede or abrogate them, such treaties will continue in operation because of the community of purpose between the sovereign states involved. In all other cases they will be abrogated.

It is important to notice that all liability for debts and contractual obligations entered into by a ceding state which has been assumed by the United States on a transfer of sovereignty, has been assumed, not as a legal obligation, but as an equitable one, as a charge upon the conscience of the new sovereign. This distinction is not a dangerous one in most cases, for the United States has always felt it is one of its duties as a sovereign to see that right and justice is done, of course, according to its own lights. Moreover, this distinction is not a particularly significant one because the whole field of international law is somewhat lacking in absolute fixed rule and methods. It has not yet crystallized. It is normative and must not be too closely bound by precedent and dogma if it is to take care of the needs of a rapidly changing world. Equity, in international law, is almost as strong and sure a word as legality.

Although what has been done, and the opinions given as to why it was done, present a general theory and a rather consistent practice, particular opinions and theories advanced to explain particular acts have often been inconsistent. Such inconsistencies are bound to arise in the settlement of governmental problems by many men over a long term of years, and in the development of a practice that will conform to new needs as they may arise. But there are several such inconsistencies which need to be pointed out.

In the first place, in the work of many writers quoted by the officials of the United States, and in the opinion of officers of the government themselves, two statements often have been used, two concepts each of which seems to deny the correctness of the other. They are used in such a manner as to invite the cynical to remark that the whole business is an invalid manipulation of logic and principles to gain certain preconceived ends. It cannot be denied that there is a certain

manipulation toward a desired end, but there should be some consistency and some singleness of purpose.

On the one hand, there exists the argument: The obligations of a territory pass to its new government because a benefit passes with its attached burden, because the new state is in possession of the funds out of which the obligation was to be paid, and because the creditor was lawfully induced to rely upon these funds which are passed to the new government. These bases all resolve into one. Creditors are induced to loan to a government for the purposes of benefiting the territory because of the resources, funds, and revenues of the old state, which included the resources, funds, and revenues deriving from the territory ceded. Because these passed to the new state, and because the property of the creditors must be protected, the debts based on such resources must pass to the new state. In other words, because that attribute of the state called territory, with its derivative attributes, that is, the resources of the land and the commerce of the inhabitants, passes from one state to another, the obligations contracted with them as a basis also must transfer. These resources are the result of the existence of the state. That is, the territory is developed through the industry of the inhabitants, which is, in turn, fostered and protected by the political organization of those inhabitants. Thus, to hold that debts pass because state resources and benefits pass, is to hold that a quantitative part of the person, or entity, of the state, is transferred.

On the other hand there is the often quoted statement, cited above, that each nation is a person before international law, that the new state is an entirely fresh being, that it neither is nor represents the person with whom the other states have contracted. (In passing, it is only fair to Mr. Hall from whom this statement was originally taken to point out that he used both the lines of argument we are discussing, but in different cases, and in regard to different problems. Those who have quoted him have employed the arguments as applying to the same set of circumstances without noticing the original discrimination in their use.) It is further argued

that, since this is true, the personal debts of the old state cannot pass to the new state because one man cannot be bound by the promises of another, especially, it may be added, when he is a sovereign person.

On the one hand, there is used the statement that the personal debts of the old state pass to the new because part of the personality of the old transfers to the new. On the other, there is employed the statement that these obligations do not pass because the personality of the successor is entirely new. Both positions have been aired in the same official opinions, no doubt unwittingly. Now it is realized that it is perfectly permissible to use one approach in one case, and one in another; but to use them not only in like cases at different times or in like cases at the same time, but in the same identical case is, it is submitted, a bit beyond the pale.

There are two cases in which the United States has departed from its age-long and oft repeated position that sovereignty is a necessary and absolute attribute of the state. In the negotiations with the Spanish Commissioners in regard to the Cuban debt, the position was taken that no state in the exercise of its sovereign power may hypothecate a debt upon a locality in perpetuity. Nevertheless, the ability to contract for a locality was one of the bases cited in the Manila Railway case opinion for the transfer of the obligations of the locality to the new state. In the second instance, the annexation of Texas, it was stated as a recognized principle of law by both the United States and Texas that a state could not willfully injure the securities it had pledged to its creditors by cession, or alienation. Certainly this also is a qualification placed on the absolute sovereign power of a state over persons and things within its jurisdiction. It is particularly interesting because the above rule was stated not as a self-imposed limitation on the United States but as a general principle of law. These inconsistencies do offer a fertile field for speculation as to what the reasoning of official America may be in any given case. However, one is tempted to ask, "What of it?" when the actual decisions of the cases and the majority

of the "Why's" given for these decisions fall into a fairly well-ordered policy.

It is felt that the main suggestion that can be offered is in regard to the dangerous tendency on the part of officials to isolate certain doctrines from the cases in which they were used. First, there is a tendency to quote erroneously. That is, there is a tendency to lift specially suited phrases out of the context which explains the connotations given to those phrases and to use them in a different case. Second, there is the confusing use of a word or phrase in different senses without adequate explanation. Both these dangerous tendencies confuse an already complicated field. They are not constructive, and may lead to injustice, uncertainty, and inefficiency. Unfortunately they have been practiced by those departments of the government which have given opinions on the subject of state succession, as a glance at the preceding examination of policy will show.

This danger may be best illustrated by a case which arose not in the United States, but in England. Lord Robert Cecil had a difficult case to present to the court on behalf of the West Rand Central Gold Mining Company. Certain properties of this company were confiscated by the South African Republic. Because of such action that state was under an obligation to the company. Great Britain succeeded the republic and came into possession of the proceeds of the property once confiscated. The Company was petitioning for its rights.

Lord Cecil, in supporting the case, pleaded that the sovereign of a conquering state was liable for the obligations of the conquered. Supporting this argument, he cited several cases which dealt truly enough with the assumption of the obligations of a former government by a succeeding one. However, it was only the looseness of the use of the words "obligations," "succession" and "conquered territory" which made their citation possible in this case. Calvin's Case held that the King had the power to legislate anew over conquered territory. The King of the Two Sicilies Case, United

States versus McRae, and the United States versus Prioleau, held that a succeeding government was responsible for the obligations of the former, but dealt, not with cases of state succession, but with governmental change, internal revolution and insurrection. Mitchel versus United States, Smith versus United States, Strother versus Lucas, Blankard versus Galdy, and Campbell versus Hall, which held that the obligations of the old state pass to the new, were dealing with the obligation of the government of the new state to respect private rights and property in the form of land grants and titles on a change of sovereignty.

Thus by divorcing ambiguous statements from the context and circumstances of the case he very cleverly and brilliantly built up what appeared to be an ironclad case for his clients. However, unfortunately for the company, Lord Alverstone, Chief Justice, exploded the case by the close examination of those cases cited, and decided it upon an entirely different set of rules.

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